Supreme Court, U.S.
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No.

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1998

LEWIS COUNTY , WASHINGTON; BILL BROOKS, County Assessor, Lewis County, Washington; DONNA KARVIA, Clerk, Lewis County Superior Court; JOE COOKE, Treasurer, Lewis County, Washington; GARY ZANDEL, County Auditor, Lewis County Washington, KEVIN E. MURPHY, BERNICE MURPHY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

1. Does 7 U.S.C. §1984 waive the immunity of the United States of America from interest, penalties and foreclosure imposed by Lewis County, Washington on real property held by respondent?

2. Did the Court of Appeals, in ruling that the waiver of immunity in 7 U.S.C. §1984 did not extend to interest, penalties and foreclosure, violate the doctrine of separation of powers?

3. Did the Court of Appeals, in ruling that the waiver of immunity in 7 U.S.C. §1984 did not extend to interest, penalties and foreclosure, violate principles of federalism?

4. Should 7 U.S.C. §1984 be liberally construed in favor of the taxing authority of Lewis County, Washington?

5. Does the commercial character of FSA's activities preclude any claim of immunity from interest, penalties or foreclosure?

RULE 29.1 STATEMENT

Pursuant to Supreme Court Rule 29.1, petitioners state that there are no parent corporations nor any non-wholly owned subsidiaries of corporate filers.

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OPINIONS BELOW

The opinion of the Court of Appeals (App. A, A1-A24) is not yet reported. An opinion of the Court of Appeals in a prior appeal in this case is reported at 94 F.3d 654. The opinion of the district court (App. B, B1-B14) is unreported.

JURISDICTION

The Court of Appeals entered its judgment on April 19, 1999. (App. A, A1-A24). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

7 U.S.C. §1984 provides, in relevant part, as follows:

> All property subject to a lien held by the United States or the title to which is acquired or held by the Secretary under this title other than property used for administrative purposes shall be subject to taxation by State, territory, district and local political subdivisions in the same manner and to the same extent as other property is taxed....

STATEMENT

A. The Subject Properties

Petitioner Lewis County is geographically large, but lightly-populated subdivision of the state of Washington, with significant portions of its lands in state and federal ownership. It has been experiencing socio-economic woes within its timber/agricultural-based economy in sharp contrast to the general economic panacea enjoyed nationwide. Petitioners Kevin and Bernice Murphy are residents of Lewis County who purchased a foreclosure property, as below described, and reestablished a working dairy farm on the property.

At various times between 1984 and 1990, the Farmers Home Administration (FmHA)[1], now known as the Farm Services Administration (FSA), acting pursuant to the authority conferred by Congress under the Consolidated Farm and Rural Development Act, 7 U.S.C. §1921 et seq., acquired title, by various means, to several parcels of property in Lewis County. Those parcels, known

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1. FmHA was succeeded by the Consolidated Farm Service Agency (FSA) in 1994. 7 U.S.C. §6932(a), (b)(3).

as the "Best," "Curtis," "Adams," "Aust," "Harris," and "Evans" properties had, prior to their acquisition by FmHA, been subject to mortgages in fav r of FmHA.

While the foregoing properties were owned by FSA, Lewis County continued to levy *ad valorem* property taxes against those properties. FSA refused to the taxes on those properties when due. Consequently, Lewis County imposed interest and penalties against those properties for nonpayment of the taxes.

On March 20, 1990, Lewis County served FSA with a Notice of Application for Judgment Foreclosing Tax Liens and Summons, pursuant to R.C.W. 84.64.050, including the Best property. The taxes claimed due in the notice were imposed during FSA's ownership. On or about June 6, 1990, the Superior Court of the State of Washington for Lewis County entered a Judgment and Order of Sale which included the Best property. On or about June 21, 1990, the Lewis County Treasurer issued a Notice of Tax Judgment Sale which included the Best property. On July 13, 1990, Lewis County conducted a tax sale and purchased the Best property.

On January 19, 1994, Lewis County published a Notice of Application for Judgment Foreclosing Tax Liens and Summons. The notice included the Adams, Aust, Curtis and Harris properties. On or about February 1, 1994, the Office of the United States Attorney for the Western District of Washington received by certified mail a copy of the notice. The taxes claimed in the notice to be due on those properties were imposed during FSA's ownership of those properties. A real property tax Judgment and Order of Sale which included that Adams, Aust, Curtis and Harris properties was entered by the Superior Court of the State of Washington for Lewis County on March 25, 1994. On or about April 18, 1994, the Lewis County Treasurer issued a Notice of Tax Judgment Sale scheduled for May 13, 1994. The notice included the Adam, Aust, Curtis and Harris properties. On or about May 5, 1994, FSA paid under protest all the property taxes, penalties, interest and other charges owing to Lewis County on the Adams, Aust, and Curtis properties for the tax years 1990-1994. The total of the taxes, penalties, interest and other charges paid at that time by FSA on the Adams, Aust and Curtis properties was $24,958.27.

In 1994, Lewis County, acting pursuant R.C.W. 84.34.108 removed the Adams, Aust and Curtis properties from an agricultural use classification. Removal of those properties from an agricultural use classification resulted in both the Aust and Curtis properties and all but one of the Adams properties being taxed at a higher rate and in the imposition of a recapture tax and interest in the amount of $58,356.82. On May 5, 1994, FSA also paid that amount under protest.

In contrast, FSA did not pay the accrued taxes, penalties and interest on the Harris property Consequently, on May 13, 1994, petitioners Kevin and Bernice Murphy purchased the Harris property at the Tax Judgment Sale from Lewis County for $53,500.

Upon acquiring the Harris property from Lewis County, petitioners Murphy, at their own expense, cleaned and repaired the property. Thereafter, petitioners Murphy rented the property for use as a dairy.

B. Proceedings Below

On September 7, 1994, respondent filed a complaint for declaratory and injunctive relief, restitution and other relief in the

United States District Court for the Western District of Washington. On or about September 30, 1994, petitioners Murphy filed an Answer and Affirmative Defenses and Counterclaim.

Petitioners filed a Motion to Dismiss pursuant to Fed R. Civ. P. 12(b)(1). Petitioner Lewis County joined in the motion of petitioners Murphy to dismiss. Respondent filed a memorandum opposing petitioners' motion to dismiss. Respondent also filed a Motion for Partial Summary Judgment. The district court in an unreported decision granted petitioners' Motion to Dismiss and denied respondent's Motion for Partial Summary Judgment. Respondent appealed. The Court of Appeals reversed and remanded. *United States v. Lewis County*, 94 F.3d 654 (9th Cir. 1996).

Upon remand to the district court, petitioners filed a motion for judgment on the pleadings. Respondent opposed the motion. The district court in an unreported opinion granted petitioners' motion. (App. B, B1-B14).

Respondent appealed. Petitioners Murphy filed a cross-

appeal. The Court of Appeals affirmed in part, reversed in part, and remanded. (App. A, A1-A24). The Court of Appeals concluded that the congressional waiver of immunity in 7 U.S.C. §1984 did not waive the immunity of the United States from interest penalties and foreclosure. (App. A, A12-A20). The Court of Appeals remanded to the District Court respondent's claim regarding imposition by petitioner Lewis County of a higher non-agricultural tax rate on three of the twenty FSA parcels for the 1994 tax year. (App. A, A19, A20). The Court of Appeals also held that respondent need not exhaust state remedies before raising claims under federal law in District Court. (App. A, A22). The Court of Appeals left for the District Court's determination the issues of exhaustion of state remedies and state limitations on respondent's claim for improper classification of FSA lands as non-agricultural. (App. A, A22). The Court of Appeals also denied, as premature, the claim of petitioners Murphy for attorneys fees pursuant to the Equal Access to Justice Act, 28 U.S.C. §2412. (App. A, A22-A23).

Petitioners timely filed a Petition for Rehearing. The

Court of Appeals denied the Petition for Rehearing by Order dated May 20, 1999. (App. C). Petitioners timely filed a Motion for Stay of Mandate. The Court of Appeals stayed the mandate by order filed on June 10, 1999. (App. D). Petitioners thereafter timely filed this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals Decision That 7 U.S.C. §1984 Does Not Waive the Immunity of the United States With Respect to Interest, Penalties and Foreclosure Misinterpreted the Statute's Requirement That All Property Acquired or Held by the Secretary of Agriculture Shall be Subject to Taxation by State Subdivisions in the Same Manner and to the Same Extent as Other Property is Taxed.

7 U.S.C. §1984 provides that the subject properties, while owned by FSA, were "subject to taxation." The Court of Appeals decision failed to adequately interpret the term "taxation." Instead, the Court of Appeals adopted the Sixth Circuit's view of the term "taxes" as announced in *United States v. Consumers Scrap Iron Corp.*, 384 F.2d 62, 64-65 (6th Cir. 1967). (App. A, A14). The

statute at issue in *Consumers Scrap Iron Corp.*, 15 U.S.C. §646, did not include the term "taxation." Moreover, the Court of Appeals' reliance on the definition of "taxes" in *Consumers Scrap Iron* fails to address FSA's definition of "tax" in 7 C.F.R. 1925.2. (App. E).

The Court of Appeals decision apparently makes no distinction between the statute's use of the term "taxation" and "taxes. " Petitioners understand the term "taxation" as referring to "[t]he process of taxing or imposing a tax." *Black's Law Dictionary* (4th Ed.1968) p.1631. Further, this Court has construed the term "taxation" in a Congressional waiver of tax immunity to include assessment, collection and refunding. *Reconstruction Finance Corporation v. Beaver County*, 328 U.S. 204, 209 (1946). The failure of the Ninth Circuit Court of Appeals to recognize the distinction between the words "taxation" and "tax" thus seriously undermines the plain intent of the statute; namely, to secure to local taxing authorities the ability to levy and timely collect tax revenue from lands acquired by FSA. Review by this Court is warranted to clarify the meaning of the term

"taxation" in the statute.

The Court of Appeals reasoned that "'taxation' does not unequivocally include interest and penalties." (App. A, A1-A16). Implicit in the reasoning of the Court of Appeals is the view that the United States is immune from interest and penalties unless Congress unequivocally provides otherwise. Such a view is contrary to the principle, frequently recognized by this Court, in the area of tax immunity, that "[s]ilence of Congress implies immunity no more than does silence of the Constitution." *Graves v. New York, ex rel. O'Keefe*, 306 U.S. 466, 480 (1939); *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 604 (1943); *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342, 365-67 (1949); *California State Board of Equalization v. Sierra Summit, Inc.*, 490 U.S. 848, 851-52 (1989). Review by this Court is therefore warranted to correct the Court of Appeals on this issue.

The Court of Appeals' extension by way of negative implication to respondent of immunity from interest, penalties and foreclosure cannot be reconciled with the rejection of such reasoning by this Court in *Sierra Summit*. 450 U.S. 851. Review

by this Court is necessary to correct the Court of Appeals' extension by 'negative implication' of immunity to FSA from interest, penalties and foreclosure.

Addressing the statute's use of the phrase "in the same manner," the Court of Appeals found the language ambiguous. (App. A, A16, A17). In so doing, the Court of Appeals overlooked the meaning given that phrase by federal precedent. *Wilder's S.S. Co. v. Low*, 112 F. 161, 164 (9th Cir. 1901). ("[T]he phrase 'in the same manner' has a well understood meaning in legislation, and that meaning is not one of restriction or limitation, but of procedure."). Further, in *Reconstruction Finance Corporation v. Beaver County*, this Court determined the phrase "to the same extent according to its value as other property is taxed" in 15 U.S.C. §610 as indicating Congressional intent to integrate Congress' permission to tax with established local tax assessment and collection machinery. 328 U.S. 210. Likewise, 7 U.S.C. §1984 evidences, by the similar phrase "in the same manner and to the same extent," a Congressional intent to integrate permission to tax with established state tax collection procedure. Review by this

Court is appropriate to give the phrase "in the same manner and to the same extent" appearing in 7 U.S.C. §1984 a meaning consistent with federal precedent.

The Court of Appeals' narrow construction of 7 U.S.C. §1984 also fueled the rejection of petitioners' argument that the United States must first exhaust state remedies before raising its claims in federal district court. (App. A, A22). An accurate reading of 7 U.S.C. §1984, to recognize Congressional consent to the "manner" and "extent" of state "taxation," necessarily subjects property acquired by FSA to the entirety of the State of Washington's real property tax code. Review by this Court is therefore necessary to resolve whether, by reason of the language of 7 U.S.C. §1984, Congress has thereby subjected property acquired by FSA to the requirement of payment of the tax under protest (R.C.W. 84.68.020); statute of limitations (R.C.W. 84.68.060); and exclusive remedies provision (R.C.W. 84.68.070).

The Court of Appeals supported its conclusion regarding exhaustion of state remedies by invoking 28 U.S.C. §§1331, 1345. (App. A, A22). Review by this Court is appropriate to resolve

whether the Court of Appeals' reliance upon general federal question jurisdiction statutes was warranted in light of the specific waiver of tax immunity in 7 U.S.C. §1984.

The Court of Appeals, in support of its conclusion that respondent need not exhaust state remedies, also relied upon *Department of Employment v. United States*, 385 U.S. 355, 357-58 (1966) and *United States v. Broward County*, 901 F.2d 1005 (11th Cir.1990). (App. A, A22). In *Department of Employment*, this Court had no occasion to construe a Congressional waiver of tax immunity such as 7 U.S.C. §1984. In relying upon *Broward County*, the Court of Appeals overlooked its earlier refusal to follow *Broward County* in *United States v. California*, 932 F.2d 1346, 1351-52 (9th Cir. 1991), *affirmed*, 507 U.S. 746 (1993). Review by this Court of the Court of Appeals decision is appropriate to determine whether the Court of Appeals misplaced reliance upon *Department of Employment* and *Broward County*.

II. The Court of Appeals Decision Violated the Doctrine of Separation of Powers.

Central to the Court of Appeals decision regarding FSA's

immunity from interest, penalties and foreclosure is that Court's application of the principle that waivers of sovereign immunity are narrowly construed in favor of the sovereign. (App. A, A15-A16). By invoking a principle of sovereign immunity in developing its opinion, the Court of Appeals refused to consider or was unaware that sovereign immunity and tax immunity are distinct concepts. *United States v. Hynes*, 20 F.3d 1437, 1444 n.1 (7th Cir.1994) (en Banc) (Cudahy, J., concurring). Review of the Court of Appeals decision is appropriate to clarify whether principles applicable to sovereign immunity are properly invoked on issues of tax immunity.

Decisions of this Court repeatedly recognize "the primary role of Congress in resolving conflicts between the national and state governments." *North Dakota v. United States*, 495 U.S. 423, 435 (1990) (citing *United States v. County of Fresno*, 429 U.S. 452, 467-68 (1977)). The deference afforded by the decisions of this Court to the primary role of Congress on matters of tax immunity derives from the doctrine of separation of powers. *United States v. New Mexico*, 455 U.S. 720, 737-38 (1982);

Jefferson County, Alabama v. Acker, 1999 WL 401256, 7 (U.S.).

The deference due Congress on matters of tax immunity has prompted this Court to decline recognition of an exemption from state taxation that Congress has not clearly established. *Rockford Life Ins. Co. v. Illinois Department of Revenue,* 482 U.S. 182, 191 (1987); *California State Board of Equalization v. Sierra Summit, Inc.*, 490 U.S. 851-52; *First Agricultural National Bank of Berkshire County v. State Tax Commission*, 392 U.S. 339, 346 (1968): *Oklahoma Tax Commission v. United States*, 319 U.S. 606-07.

The Court of Appeals decision violates the foregoing principles by affording FSA an immunity from interest, penalties and foreclosure where Congress has not clearly established such immunity. The Court of Appeals recognized such immunity by simply invoking a rule of statutory construction. The Court of Appeals made no attempt to support its invocation of a rule of strict construction of the statute in favor of the federal sovereign with any language in the text of 7 U.S.C. §1984.

The Court of Appeals found support for FSA's immunity

from foreclosure in the following excerpt from Senate Report No. 566, 87th Cong., 1st Sess.:

> Property acquired in liquidation of loans is disposed of promptly, so that the incident of the tax does not greatly interfere with the resale of the property or the recovery of security value. (App. A, A18).

The foregoing excerpt from the Senate Report fails to mention anything with respect to foreclosure of FSA properties for nonpayment of taxes, thus failing to provide the clear expression of Congressional intent to exempt property from state taxation required by this Court's decisions in *Rockford* and *Sierra Summit*.

By employing a rule of statutory construction to confer immunity from interest, penalties and foreclosure, the Court of Appeals assumed the role of final arbiter of the competing demands between two sovereigns. The Court of Appeals has failed to heed this Court's admonition that "the political process is 'uniquely adapted to accommodating the competing demands' in this area." *United States v. New Mexico*, 455 U.S. 738 (quoting

Massachusetts v United States, 435 U.S. 444, 456 (1978)).

Review by this Court of the Court of Appeals decision will provide an opportunity for this Court to give needed guidance on the role of a federal court in construing a Congressional waiver of tax immunity such as 7 U.S.C. §1984.

III. The Court of Appeals Decision Violated Principles of Federalism.

Principles of federalism require that a federal court take a narrow approach to questions of governmental tax immunity. *United States v. New Mexico*, 455 U.S. 735-36; *Arizona Department of Revenue v. Blaze Construction, Inc.*, 67 U.S.L.W. 4156, 4157 (1999). The Court of Appeals decision violates those principles by depriving petitioner Lewis County access to traditional means of enforcing taxes and raising operating revenue from properties acquired by FSA. Instead, the Court of Appeals "assume[s]" that the FSA will "pay its taxes when due," or at least before "convey[ing] marketable title," whenever that date arrives. (App. A, A19).

This Court has further recognized that to displace

traditional state regulation, the federal statutory purpose must be "'clear and manifest'". *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (quoting *English v. General Electric Co.*, 496 U.S. 72, 79 (1990)). The Court of Appeals decision makes no pretense of identifying such purpose in 7 U.S.C. §1984. Review by this Court of the Court of Appeals decision is therefore needed to resolve whether 7 U.S.C. §1984 can be said to clearly and manifestly evidence a Congressional intent to displace petitioner Lewis County's access to traditional property tax collection devices and needed tax revenue.

IV. The Court of Appeals Decision is in Conflict With *California State Board of Equalization v. Summit, Inc.*, 490 U.S. 844 (1989).

The Court of Appeals' reasoning with respect to FSA's claim of immunity from interest, penalties and foreclosure rests on the premise that "waivers of sovereignty must be strictly construed in favor of the sovereign." The Court of Appeals' adoption of such a premise places the Court of Appeals' decision irreconcilably in conflict with this Court's decision in *Sierra Summit*. Central to

this Court's decision in *Sierra Summit* was a liberal construction of the Congressional waiver of tax immunity in 28 U.S.C. §960 in favor of state taxes. 490 U.S. 852 n.9. The Court of Appeals decision fails to even mention *Sierra Summit*. Petitioners know of no plausible reason why the Congressional waiver of tax immunity in 28 U.S.C. §960 should be afforded a liberal construction in favor of state taxation by this Court in *Sierra Summit*, while in this case the similar Congressional waiver of tax immunity in 7 U.S.C. §1984 be narrowly construed by the Court of Appeals in favor of the federal sovereign. Only by undertaking review of the Court of Appeals decision can this Court resolve the conflict with *Sierra Summit* raised by the Court of Appeals' narrow construction of 7 U.S.C. §1984 in favor of the federal sovereign.

V. The Court of Appeals Decision Failed to Adequately Consider the Legislative History of the Statute.

The Congressional intent behind 7 U.S.C. §1984 is evident from the evolution of Congressional enactments in this area. Congress first spoke on FSA's exemption from state taxes in Section 40(1) of the Bankhead-Jones Farm Tenant Act of 1937,

Act of July 22, 1937, Ch. 517, 50 Stat. 522, 531. (App. E). Congress progressed to the limited waiver of tax immunity in §501(a) of the Farmers Home Administration Act of August 14, 1946, Ch. 964, 60 Stat. 1062. (App. E). Congress expanded the waiver of tax immunity to its present form by passage of 7 U.S.C. §1984, adopted in 1961 as Public Law 87-128, Title III, Subtitle D§334, 75 Stat. 315. (App. E). Thus, it is evident that the policy of Congress for the past 50 years has been to expand, rather than to contract, the scope of the waiver of FSA's immunity from state and local taxation.

The Court of Appeals decision gives little, if any recognition to Congress' expansion of the waiver of FSA's waiver of tax immunity. The Court of Appeals' narrow construction of 7 U.S.C. §1984 therefore cannot be reconciled with the statute's history. Review by this Court of the Court of Appeals' decision will provide an opportunity for this Court to resolve the conflict between the Court of Appeals' decision and the legislative history of 7 U.S.C. §1984.

VI. The Court of Appeals Decision that 7 U.S.C. §1984 Does Not Waive the Immunity of the United States With Respect to Interest, is in Conflict With *Library of Congress v. Shaw*, 478 U.S. 310, 317 n.5 (1986).

In concluding that 7 U.S.C. §1984 did not waive FSA's immunity from interest, the Court of Appeals relied upon *Library of Congress v. Shaw*, 478 U.S. 310, 319-20 (1986). (App. A, A15). The Court of Appeals overlooked this Court's recognition in *Shaw* of an exception to the no-interest rule when a federal entity engages in a commercial activity. "[T]he no-interest rule is simply inapplicable where the Government has cast off the cloak of sovereignty and assumed the status of a private commercial lender." 478 U.S. 318 n.6 (citing *Standard Oil Co. v. United States*, 267 U.S. 76, 79 (1925)).

FSA's activities in this case, in acquiring title to properties securing loans made by FSA, are clearly commercial in character. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 734-35 (1979).

The Court of Appeals decision fails to recognize the commercial activity exception to the 'no- interest rule.' The Court

of Appeals decision is therefore in direct conflict with *Shaw*. Review by this Court of the Court of Appeals decision is appropriate to resolve the conflict created by the Court of Appeals' failure to apply the commercial activity exception to the no-interest rule recognized in *Shaw*.

VII. The Court of Appeals Decision is in Conflict With *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979).

The Court of Appeals expressed doubt that Congress intended the outcome whether FSA was subject to interest, penalties and foreclosure to depend upon varying characterizations of state law. (App. A, A14). Such a view of 7 U.S.C.§1984 is at odds with this Court's recognition of FSA's high degree of integration of its regulations with state law. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 730-31. In *Kimbell Foods*, the integration of FSA's regulations with state law prompted this Court's conclusion that a uniform federal rule of priority was unnecessary to protect FSA's interests. 440 U.S. 732.

Such a conclusion is no less warranted here. The Court of Appeals decision fails to identify any activity on the part of FSA

that would require departure from this court's analysis in *Kimbell Foods.*

The Court of Appeals cited *Kimbell Foods*, but did so without discussion. (App. A, A12). Instead, the Court of Appeals chose the view of the Sixth Circuit in *Consumers Scrap Iron*, 384 F.2d 64-65. The construction given the Small Business Act in *Consumers Scrap Iron* must give way to the analysis of that Act in *Kimbell Foods.* Review by this Court of the Court of Appeals decision is therefore necessary to resolve whether 7 U.S.C.§1984 should be construed in accordance with this Court's opinion in *Kimbell Foods.*

VIII. The Court of Appeals Decision Failed to Consider the Effect of the Commercial Character of FSA's Activities Upon FSA's Claim of Immunity From Interest, Penalties and Foreclosure.

Conspicuously absent from the Court of Appeals decision is any meaningful discussion of the commercial character of FSA's activities. In *Kimbell Foods*, this Court concluded that the status of FmHA as a quasi-commercial lender deprived FmHA of any

special priority to which the federal sovereign is entitled in its tax collecting capacity. 440 U.S. 737-38.

Kimbell Foods has provided persuasive authority to federal courts in resolving claims of tax immunity asserted by federal lending entities against state or local taxing authorities. *United States v. Tipton*, 898 F.2d 770 (10th Cir. 1990); *Pearlstein v. SBA*, 719 F.2d 1169, 1176-77 (C.A.D.C. 1983); *United States v. Dansby*, 509 F.Supp. 188, 193-95 (N.D. Ohio 1981); *United States v. Marion County, Fla.*, 826 F.Supp. 1400, 1402 (M.D., Fla. 1993); *Vail v. Brown*, 841 F.Supp. 909 (D.Minn.), *affirmed*, 39 F.3d 208 (8th Cir. 1994), *cert. denied*, 515 U.S. 1102 (1995).

More recently, in *Arkansas v. Farm Credit Services of Arkansas*, 520 U.S. 821 (1997), this Court again concluded that the commercial character of a federal lending entity's activities deprived the entity of any claim of exemption from the Tax Injunctions Act. 28 U.S.C. §1341. 520 U.S. 531-32.

The Court of Appeals' failure to afford any weight to the commercial character of FSA's activities in this case places the Court of Appeals decision in conflict with *Kimbell Foods* and its

progeny and with *Farm Credit Services*. Review by this Court of the Court of Appeals decision is therefore necessary to resolve this conflict.

IX. The Court of Appeals Decision is in Conflict With *Reconstruction Finance Corporation v. Beaver County*, 328 U.S. 204 (1946) and *Federal Reserve Bank v. City of Richmond*, 957 F.2d 134 (4th Cir. 1992).

The Court of Appeals refused to read "taxation" in 7 U.S.C. §1984 to include interest, penalties and foreclosure. (App. A, A16). In contrast, in *Reconstruction Finance Corporation v. Beaver County*, 328 U.S. 204 (1946), this Court construed the term "taxation" in 15 U.S.C. §610[2] to include assessment, collection and refunding. 328 U.S. 209. Further, in *Beaver County*, this Court concluded that the language of 15 U.S.C. §610 precluded any assumption that Congress intended a rule of uniform results regarding the taxation of real property. 328 U.S. 209. Further, in *Beaver County*, this Court construed Congress' use, in 15 U.S.C.

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2. 47 Stat. 5, 55 Stat. 248.

§610, of the phrase "to the same extent according to its value as other real property is taxed" as indicating "an intent to integrate Congressional permission to tax with established local tax assessment and collection machinery." 328 U.S. 210.

The Court of Appeals' construction of 7 U.S.C. §1984 cannot be reconciled with this Court's construction in *Beaver County* of similar language in 15 U.S.C. §610. Review by this Court is therefore necessary to provide a construction of 7 U.S.C. §610 that is consistent with this Court's decision in *Beaver County*.

Review by this Court of the Court of Appeals decision is also necessary to resolve the conflict created by the court of Appeals' refusal to follow the reasoning of the Fourth Circuit in *United States v. City of Richmond*, 957 F.2d 134 (4th Cir. 1992), in which the Fourth Circuit followed *Beaver County* in resolving whether the term "tax" in 12 U.S.C. §531 included interest and penalties. 957 F.2d 136.

The Court of Appeals read *City of Richmond*'s reference to the State of Virginia's definition of "tax" to include interest and penalties as warranting an opposite conclusion under Washington

law. (App. A, A14 n.6). The use of the term "taxation" in 7 U.S.C. §1984 precludes such a conclusion in this case.

Review by this Court of the Court of Appeals decision is therefore necessary to resolve the conflict created by the Court of Appeals' refusal to follow *Beaver County* and *City of Richmond.*

X. The Court of Appeals Decision is in Conflict with 7 C.F.R. §§1925.2, 1925.4(b).

The Court of Appeals concluded that 7 U.S.C. §1984 does not waive FSA's immunity from penalties. (App. A, A16). The Court of Appeals decision fails to cite FSA's regulations on point. 7 C.F.R. §1925.4(b) directs FSA officials, in the event the borrower is unable or unwilling to pay the delinquent tax, to pay the amount of the delinquent taxes plus the amount of any accrued penalty. (App. E). The practical effect of the Court of Appeals' decision regarding penalties is to invalidate 7 C.F.R. §1925.4(b). Such an outcome represents an unprecedented interference by a federal court with the powers delegated by Congress to a federal executive department. 7 U.S.C. §1989. Review by this Court is therefore necessary to construe 7 U.S.C. §1984 in a manner

consistent with FSA's regulations.

XI. The Court of Appeals Decision Misplaced Reliance Upon *United States v. Alabama*, 313 U.S. 274 (1941).

In concluding that 7 U.S.C. §1984 does not waive FSA's immunity from foreclosure, the Court of Appeals misplaced reliance on *United States v. Alabama*, 313 U.S. 274 (1941). *Alabama* predates both 7 U.S.C. §1984 and its predecessor statute. *Alabama* must therefore be read in light of these subsequent legislative enactments. *Alabama* must also be read in light of *Beaver County, Kimbell Foods* and *Sierra Summit*. Review by this Court of the Court of Appeals decision regarding FSA's immunity from foreclosure is therefore warranted.

The Court of Appeals also reasoned that foreclosure against FSA property would interfere with FSA's statutory obligation to offer forfeited property for re-sale to qualified farmers, citing 7 U.S.C. §1985(c)(1)(B). (App. A, A18). The Court of Appeals' reasoning overlooks FSA's opportunity to eliminate any such interference with its statutory mission by simply following the mandate of 7 U.S.C. §1984 and paying the taxes assessed by Lewis

County at the time the taxes were due.

The Court of Appeals supported its reasoning regarding FSA's immunity from foreclosure with the following excerpt from S.Rep. No. 566, 87th Cong., 1st Sess.:

> Property acquired in liquidation of loans is disposed of promptly, so that the incident of a tax does not greatly interfere with the re-sale of the property or the recovery of security value. (App. A, A18).

The Court of Appeals' reliance upon the following excerpt from the Senate Report cannot be reconciled with FSA's activities in this case in holding the subject properties for years. Such activity cannot fairly be said to constitute the prompt disposal of property acquired in liquidation of loans contemplated by Congress in enacting 7 U.S.C. §1984. Review by this Court of the Court of Appeals' decision is necessary to resolve whether foreclosure against FSA property would thwart the intent of Congress.

XII. The Court of Appeals Decision Erred in Concluding that Petitioners Murphy Were not Prevailing Parties Under 28 U.S.C. §2412.

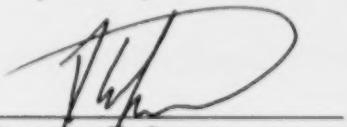
The errors in the Court of Appeals decision discussed above undermine the Court of Appeals' conclusion that petitioners Murphy were not prevailing parties under 28 U.S.C. §2412. Review of the Court of Appeals decision on the status of petitioners Murphy as prevailing parties under 28 U.S.C. §2412 is warranted.

CONCLUSION

"And David put his hand in his bag, and took thence a stone, and slang it ... " (1 Samuel 17:49).

The petition for a writ of certiorari should be granted.

Respectfully submitted



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APPENDIX A

Opinion, *United States of America v. Lewis County*, U.S.C.A. 9 Nos. 97-35720 and 97-35510 (filed April 19, 1999)

APPENDIX B

Amended Order Granting Defendants Murphys' Motion for Judgment on the Pleadings, *United States of America v. Lewis County*, U.S.D.C. W.D.WA No. C94-5474FDB

Judgment, *United States of America v. Lewis County*, U.S.D.C. W.D.WA No. C94-5474FDB

APPENDIX C

Order Denying Rehearing, *United States of America v. Lewis County*, U.S.C.A. 9 Nos. 97-35510, 97-35720 (filed May 20, 1999)

APPENDIX D

Order Staying Mandate, U.S.C.A. 9 Nos. 97-35510, 97-35720 (filed June 10, 1999)

APPENDIX E

Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations

APPENDIX A

UNITED STATES of America,

Plaintiff-Appellant-Cross-Appellee,

v.

LEWIS COUNTY, WA; Bill Brooks, County Assessor, Lewis County, Washington; Donna Karvia, Clerk, Lewis County Superior Court; Joe Cooke, Treasurer, Lewis County, Washington; Gary Zandel, Defendants-Appellees,

and

Kevin E. Murphy; Bernice Murphy, Defendants-Appellees-Cross-Appellants.

Nos. 97-35510, 97-35720.

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted July 7, 1998.

Decided April 19, 1999.

Federal government brought action against county, challenging county's assessment of taxes, interest, and penalties on farm property acquired by the federal Farm Service Agency (FSA)

and county's foreclosure on one parcel. Government also asserted claims against purchasers who bought one FSA parcel from county at foreclosure sale. The United States District Court for the Western District of Washington, Franklin D. Burgess, J., entered judgment for county and purchasers on the pleadings, and government appealed. Purchasers cross-appealed. The Court of Appeals, Canby, Circuit Judge, held that: (1) county could tax property held by FSA; (2) taxation did not improperly discriminate against federal government under doctrine of intergovernmental tax immunity; (3) federal government's waiver of immunity did not extend to interest, penalties, or foreclosure; (4) whether property was properly characterized as agricultural had to be determined by state law; and (5) purchasers' counterclaims were either not properly raised or were premature.

Affirmed in part, dismissed in part, reversed in part, and remanded.

David English Carmack, Bridget M. Rowan, Tax Division, United States Department of Justice, Washington, D.C., for plaintiff-appellant-cross- appellee.

Douglas E. Jensen, Office of the Prosecuting Attorney, Chehalis,

Washington, for defendants-appellees.

Christopher M. Constantine, Tacoma, Washington, for defendants-appellees- cross-appellants.

Appeals from the United States District Court for the Western District of Washington; Franklin D. Burgess, District Judge, Presiding. D.C. No. CV-94- 05474-FDB.

Before: CANBY and TASHIMA, Circuit Judges, and TAKASUGI,[1] District Judge.

CANBY, Circuit Judge:

A federal statute, 7 U.S.C. § 1984, partially waives the immunity of the federal government from state taxation by authorizing state and local governments to tax farm property owned by the federal Farm Service Agency ("FSA") "in the same manner and to the same extent as other property is taxed." Id. Lewis County, Washington, imposed taxes, interest and penalties upon twenty parcels of farm property acquired by the FSA, and foreclosed on one of the parcels. The United States filed this action in district court,

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1. The Honorable Robert M. Takasugi, Senior United States District Judge for the Central District of California, sitting by designation.

challenging these actions of the County. The United States contends that, because the County does not tax a comparable state agency, its tax is discriminatory and does not meet the requirements of § 1984 that the federal property be taxed "in the same manner and to the same extent as other property." Id. The United States also argues that, in any event, § 1984 does not authorize the County to collect interest and penalties, or to foreclose in the event of delinquency. The United States also disputed the County's application of a higher nonagricultural tax rate to three of the parcels. The United States now appeals from the district court's judgment for the County on the pleadings, entered pursuant to Fed. R. Civ. Pro. 12(c). We review de novo. See *McGann v. Ernst & Young*, 102 F.3d 390, 392 (9th Cir.1996). We conclude that Lewis County may tax the FSA properties in issue, but that it may neither impose interest and penalties nor foreclose on those properties. We also conclude that the United States may challenge the imposition of the higher non-agricultural tax rate on the ground that it discriminates against the United States. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

The United States named Kevin and Bernice Murphy as co-defendants because they had purchased an FSA parcel from Lewis County during a tax foreclosure sale. As cross-appellants, the Murphys seek to strike the declaration of a witness and obtain attorneys fees. They also assert affirmative defenses in their cross appeal. We do not rule upon most of the Murphys' contentions because they are improperly or prematurely raised.

BACKGROUND

The FSA, an agency of the Department of Agriculture, lends money to farmers and ranchers unable to obtain loans elsewhere.[2] 7 U.S.C. § 1922 (1988 and Supp.1998). The agency may acquire title to property securing a particular loan if the borrower defaults. 7 U.S.C. § 1985(a). Title 7 U.S.C. § 1984 provides that:

> All property ... the title to which is acquired or held by the Secretary under this chapter other than property used for administrative purposes shall be subject to taxation by State, territory, district, and local political

2. The FSA succeeds the Farmers Home Administration, which Congress abolished in 1994. 7 U.S.C. § 6932 (Supp.1998). Although the events of this case span the reorganization of the agency, we will refer to the agency only as the FSA.

subdivisions in the same manner and to the same extent as other property is taxed....

Thus, state and local authorities may apply a nondiscriminatory tax to property acquired by the FSA through loan default.

Lewis County assessed property taxes against twenty parcels of farmland held by the FSA. The FSA initially refused to pay the taxes, as well as the related interest and penalties. The FSA also objected to the County's taxation of three of the parcels at a higher nonagricultural rate. The County then initiated foreclosure actions against the parcels. Under protest, the FSA paid the taxes, penalties, and interest with regard to nineteen of the parcels in order to pass clear titles to eligible buyers. The County foreclosed on the remaining parcel and the Murphys purchased it at the foreclosure sale.

The United States then sued for damages and declaratory relief. The district court dismissed the complaint for lack of jurisdiction pursuant to the Tax Injunction Act, 28 U.S.C. § 1341 (1993). This court reversed in an unpublished decision and remanded for a consideration of the substantive issues. *United States v. Lewis*

County, 94 F.3d 654 (9th Cir.1996)(Table). On remand, the Murphys and the County moved for judgment on the pleadings. The district court granted the motion, reasoning that 7 U.S.C. § 1984 provided a broad waiver of the federal government's immunity from state and local taxation with regard to agricultural property acquired by the FSA.

DISCUSSION

I. Taxation of FSA Property

A. 7 U.S.C. § 1984

Washington's property tax scheme exempts from taxation "[a]ll property belonging exclusively to the United States, the state, any county or municipal corporation." Wash. Rev. Code § 84.36.010 (1991). The state's tax scheme also provides that, notwithstanding § 84.36.010, federally owned property is taxable whenever authorized by federal law. See id. § 84.40.315.[3] Thus, property acquired by the FSA through loan default is taxable pursuant to 7 U.S.C. § 1984.

The United States emphasizes that all state and local

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3. A State may not directly tax the United States without the federal government's consent. See *United States v. New Mexico*, 455 U.S. 720, 733, 102 S.Ct. 1373, 71 L.Ed.2d 580 (1982).

government property in Washington is tax-exempt, including property acquired by the Washington State Housing Finance Commission ("Housing Commission"). The Housing Commission performs a mission that is similar to the mission of the FSA. The United States then points out that Lewis County may tax FSA property only "in the same manner and to the same extent as other property is taxed." 7 U.S.C. § 1984. It insists that property acquired by Washington's Housing Commission is the relevant "other property." It reasons that, because Lewis County may not tax property held by the Housing Commission, or any other state or local government property, the County may not tax property held by the FSA. Thus, the United States would construe "other property" as "other publicly held property."

We do not read "other property" so narrowly. Congress must have known that states uniformly exempt state and local property from taxation. See *Van Brocklin v. Tennessee*, 117 U.S. 151, 173-75, 6 S.Ct. 670, 29 L.Ed. 845 (1886). If we construe 7 U.S.C. § 1984 to subject FSA property to taxation only where state and local government property is also taxed, then the waiver would rarely (if

ever) take effect. By enacting 7 U.S.C. § 1984, however, Congress plainly intended to preserve the local tax base in counties where the FSA operates. We decline to interpret the provision in a way that would frustrate the obvious intent of Congress. See *Philbrook v. Glodgett*, 421 U.S. 707, 713, 95 S.Ct. 1893, 44 L.Ed.2d 525 (1975); *United States v. Hynes*, 20 F.3d 1437, 1442 (7th Cir.1994) (en banc). "Other property" must mean "other non- exempt property." Thus, Lewis County did not violate 7 U.S.C. § 1984 because it taxed FSA property just as it taxed other non-exempt property.[4]

B. Intergovernmental Tax Immunity

The United States also invokes the general principle of intergovernmental tax immunity that prohibits discrimination against a state taxpayer because of that taxpayer's connection with the federal sovereign. See *Davis v. Michigan Dept. of the Treasury*, 489 U.S. 803, 816, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989) (citing *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 383, 80 S.Ct. 474, 4 L.Ed.2d 384 (1960)). The relevant inquiry in such cases is

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4. We are not faced in this case with a contention that the state has established such a comprehensive system of exemptions that a grossly disproportionate share of the total tax burden falls on the United States. Our decision does not address such a situation.

whether the inconsistent treatment is justified by significant differences between the class of persons or items taxed and the class that is not taxed. Id.

Washington's tax scheme undeniably discriminates between farmland that is held by the FSA and farmland that is similarly held by the state. State and local governments have traditionally exempted themselves from state and local taxation, however. See, e.g., *Burr v. Boston, 208 Mass.* 537, 538-39, 95 N.E. 208, 209-10 (1911). The state or local government would gain no revenue, and would incur some expense, by taxing itself. Taxation of federally owned property, however, does generate revenue for the state. It is possible that this distinction might not be sufficiently significant in the absence of congressional action because, in evaluating the difference in treatment, " 'the [federal] Government's interests must be weighed in the balance.' " *Davis*, 489 U.S. at 816, 109 S.Ct. 1500 (quoting *Phillips Chemical*, 361 U.S. at 385, 80 S.Ct. 474). Here, however, Congress has made its assessment of the federal interest in 7 U.S.C. § 1984 and, as we have already pointed out, that statute reflects an intent to prevent federal repossession from causing farm land to be

removed from the state's tax rolls. Congress's action sufficiently qualifies the intergovernmental immunity of the United States to permit the state to make the distinction it has. We see no reason why state or local governments must engage in a circular process of taxing themselves in order to impose the tax on the federal government that Congress has authorized.

It is also worth noting that the County's tax on FSA-owned farmland is also imposed on privately-owned farmland in general. Thus there is a political check against excessive taxation. See *South Carolina v. Baker*, 485 U.S. 505, 525 n. 15, 108 S.Ct. 1355, 99 L.Ed.2d 592 (1988).

> A "political check" is provided when a state tax falls on a significant group of state citizens who can be counted upon to use their votes to keep the State from raising the tax excessively, and thus placing an unfair burden on the Federal Government. It has been thought necessary because the United States does not have a direct voice in the state legislatures.

Washington v. United States, 460 U.S. 536, 545, 103 S.Ct.

1344, 75 L.Ed.2d 264 (1983). In the present case, Lewis County taxed private farmland to the same extent, and in the same manner, as it taxed FSA farmland.[5] See Wash. Rev. Code § 84.36.005. Excessive taxation of the United States is accordingly unlikely.

II. Interest and penalties

The parties dispute whether federal or state law determines the extent of Congress's waiver of immunity from "taxation" in § 1984. We agree with the United States that the question of the scope of a congressional waiver of the federal government's immunity is one of federal law. See *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204, 208, 66 S.Ct. 992, 90 L.Ed. 1172 (1946) ("What meaning Congress intended [in its waiver] is a federal question which we must determine"). As Beaver County indicates, however, Congress may intend, as a matter of federal law, to apply a state rule. See also *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727-28, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979).

In Beaver County, the issue was whether Congress, in

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5. We address in Section IV, infra, the contention of the United States that the state has improperly taxed three of its farmland parcels at a higher, non-agricultural rate.

consenting to local taxation of certain federally-owned "real property," permitted Beaver County to tax heavy factory machinery because under state law such machinery was considered part of the factory real estate. The Supreme Court held that, the phrase being undefined by Congress, "the Congressional purpose can best be accomplished by application of settled state rules as to what constitutes 'real property.'" *Beaver County*, 328 U.S. at 210, 66 S.Ct. 992. Two circuits have held that the rule of Beaver County applies as well to the question whether interest and penalties were within § 1984's meaning of "taxation." See *Federal Reserve Bank of Richmond v. Richmond*, 957 F.2d 134 (4th Cir.1992); *Reconstruction Finance Corp. v. Texas*, 229 F.2d 9 (5th Cir.1956). The Fourth Circuit concluded that the Federal Reserve Bank must pay interest and penalties because Virginia law provided that those charges were taxes. *Richmond*, 957 F.2d at 137. The Fifth Circuit concluded that the Reconstruction Finance Corporation was not liable for those items because interest and penalties were no part of the tax under *Texas law. Reconstruction Finance Corp. v. Texas*, 229 F.2d 9, 11-12 (5th Cir.1956).

With all due respect, we disagree with the approach of the Fourth and Fifth Circuits. We do not read Beaver County so broadly. Its ruling that Congress intended "real estate" to be determined by state law was grounded in part on the Supreme Court's recognition that "[c]oncepts of real property are deeply rooted in state traditions, customs, habits, and laws." *Beaver County*, 328 U.S. at 210, 66 S.Ct. 992. In contrast, there is a strong federal interest in the question whether the United States should be subject to state-imposed interest, penalties and foreclosures, and we doubt that Congress intended the outcome to depend upon varying characterizations of state law.[6] We prefer the view of the Sixth Circuit, which held that the meaning of a waiver of immunity from state "taxes" was to be determined by federal law, notwithstanding Beaver County. See *United States v. Consumers Scrap Iron Corp.*, 384 F.2d 62, 64-65 (6th Cir.1967); see

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6. We note, however, that if state law were determinative, the County would fare no better. The Washington Supreme Court has ruled that "[t]he provision exacting payment of interest for delinquency in the payment of taxes does not make the interest a part of the tax." *Henry v. McKay*, 164 Wash. 526, 533, 3 P.2d 145, 148 (1931). It treats penalties in the same fashion. See id.; cf. *State ex rel. Kern v. Emerson*, 90 Wash. 565, 572, 155 P. 579, 582 (1916). A Washington statute defines "tax" to include interest and penalties, but only for the purpose of an application for refund. Wash. Rev. Code § 84.69.010(2). That definition permits taxpayers to recover interest and penalties erroneously paid, but does not purport to characterize the nature of those impositions for other purposes.

also *Missouri Pacific R. Co. v. Ault*, 256 U.S. 554, 565, 41 S.Ct. 593, 65 L.Ed. 1087 (1921) (whether an award is compensation or is a penalty not included in a waiver of immunity is a question of federal, not state, law).

As a matter of federal law, there is a long tradition establishing that "in the absence of constitutional requirements, interest can be recovered against the United States only if express consent to such a recovery has been given by Congress.... There can be no consent by implication or by use of any ambiguous language." *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 659, 67 S.Ct. 601, 91 L.Ed. 577 (1947); see *Library of Congress v. Shaw*, 478 U.S. 310, 314-16, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986). The same principle applies with at least equal force to penalties. See *United States Dept. of Energy v. Ohio*, 503 U.S. 607, 615, 112 S.Ct. 1627, 118 L.Ed.2d 255 (1992); *Consumers Scrap*, 384 F.2d at 65. The Supreme Court has also repeatedly stated that waivers of sovereign immunity must be strictly construed in favor of the sovereign. See *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992); *McMahon v. United States*, 342 U.S. 25, 27,

72 S.Ct. 17, 96 L.Ed. 26 (1951).

Applying these principles, we conclude that Congress has not waived the immunity of the United States from interest and penalties. The term "taxation" does not unequivocally include the assessment of interest and penalties. A closer question is whether immunity from interest and penalties is waived by the provision of § 1984 that FSA-held property is subject to taxation "in the same manner and to the same extent as other property is taxed." 7 U.S.C. § 1984. There is some force to the County's argument that this provision is a broad waiver intended to permit the states to apply their entire system of enforcement machinery against the United States, "in the same manner" as the states would apply that machinery against private taxpayers. See *Beaver County*, 328 U.S. at 210, 66 S.Ct. 992; but see *Library of Congress v. Shaw*, 478 U.S. 310, 319-20, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986) ("[s]tatutes placing the United States in the same position as a private party ... have been read narrowly to preserve certain immunities that the United States has enjoyed historically"). The difficulty with the County's approach is that, even though Congress could have entertained that intent, it did not express

it unequivocally. The requirement that federally-held property be subject to taxation "in the same manner" as other property can refer to the time when the tax is due, the manner of valuation, or any number of other elements of the state taxing process other than the imposition of interest, penalties and foreclosure. This plausible interpretation is sufficient to render the meaning of the phrase "in the same manner" ambiguous and preclude us from accepting it as an unequivocal waiver of immunity from interest, penalties and foreclosure. See *Nordic Village*, 503 U.S. at 37, 112 S.Ct. 1011; *Dept. of Energy v. Ohio*, 503 U.S. at 619-20, 626-27, 112 S.Ct. 1627; see also *Lane v. Pena*, 518 U.S. 187, 116 S.Ct. 2092, 2100, 135 L.Ed.2d 486 (1996).[7]

III. Foreclosure

Foreclosure against federally-owned property is a suit against the United States, which cannot be prosecuted without its consent. See *United States v. Alabama*, 313 U.S. 274, 282, 61 S.Ct. 1011, 85

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7. The Third Circuit permitted the imposition of civil penalties on the Postal Service without an unequivocal waiver, but in doing so the court distinguished the autonomous Postal Service from the government itself. *Pennsylvania v. U.S. Postal Service*, 13 F.3d 62, 67 (1993). The Third Circuit recognized that the United States had been held immune from penalties under the same statute in *Dept. of Energy v. Ohio*, supra.

L.Ed. 1327 (1941). The district court concluded that 7 U.S.C. § 1984 empowered Lewis County to foreclose on FSA property on the ground that "taxation ... in the same manner" refers to the procedures for collecting taxes, which include foreclosure. For the reasons already discussed in the preceding section, we cannot accept that phraseology as an unequivocal waiver of immunity.

Foreclosure against FSA property would also interfere with the statutory mission of that agency. The FSA is required, for example, to offer forfeited property for resale to qualified farmers. See 7 U.S.C. § 1985(c)(1)(B). A state foreclosing for a tax debt is under no such compulsion, and thus might frustrate Congress's intent in imposing the restriction. Congress apparently did not contemplate any such possibility in enacting § 1984. See S.Rep. No. 566, 87th Cong., 1st Sess., reprinted at 1961 U.S.C.C.A.N. 2243, 2316 ("Property acquired in liquidation of loans is disposed of promptly, so that the incident of the tax does not greatly interfere with the resale of the property or the recovery of security value"). We conclude, therefore, that § 1984 does not waive the immunity of the United States from foreclosure of its property by the County.

It is true that the inability to foreclose impairs the County's ability to collect its tax. Such dislocations are not unknown when a taxing authority deals with another sovereign. See *Oklahoma Tax Comm'n v. Potawatomi Tribe*, 498 U.S. 505, 514, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991). We assume, however, that, now that its liability for taxes (but not interest or penalties) has been established, the United States will pay its taxes when due. Payment of such taxes would seem to be a prerequisite to the ability to convey marketable title.

For these reasons, we reverse the judgment of the district court with respect to the County's foreclosure.[8]

IV. Nonagricultural Tax Rate

Lewis County imposed a higher nonagricultural tax rate on three of the twenty FSA parcels for the 1994 tax year. The County also imposed a recapture tax on the ground that it should have applied the higher tax rate in previous years. The United States argued in its complaint that the higher tax rate was inappropriate because the

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8. The Murphys assert that they are entitled to compensation for the improvements that they made to the property. We leave this question to the district court for consideration on remand.

parcels had remained agricultural. The district court did not address this claim.

In contrast to the question whether the United States is subject to interest, penalties, and foreclosure, the question whether the state properly characterized the land as agricultural must be determined according to state law. The issue falls directly within Beaver County. The congressional purposes behind § 1984 are best accomplished by "application of settled state rules" geared to state real-property concepts. *Beaver County*, 328 U.S. at 210, 66 S.Ct. 992. The only issue to be determined purely as a matter of federal law is whether the County has discriminated against the United States in the establishment or implementation of its rules. See id. We remand the claim concerning the non-agricultural tax rates to the district court for determination according to these standards.

V. The Murphys' Cross-Appeal

In addition to joining many of the arguments of the County as appellees, the Murphys' cross-appeal from the district court's judgment. They claim that: (1) the district court erred in ruling on a motion to strike portions of certain declarations; (2) in the event of

remand, they are entitled to relief on their counterclaim for cost of improvements to the property; (3) the United States failed to exhaust state administrative remedies and is barred by limitations from doing so now; and (4) they are entitled to attorneys fees under the Equal Access to Justice Act.

Claims (1) and (2) are not properly raised because the Murphys wholly prevailed in district court when the court granted judgment against the United States on the pleadings. A party who is not aggrieved by a judgment ordinarily may not appeal from it. See *Deposit Guaranty Natl. Bank v. Roper*, 445 U.S. 326, 333, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980). The rulings challenged by the Murphys are not collateral matters that fall within an exception to this rule. See id. at 333-34, 100 S.Ct. 1166.[9]

For the same reason, claim (3) is not a proper subject of cross-appeal, although failure to exhaust can be raised in the main appeal as an alternative argument in support of the district court's judgment. See *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*,

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9. Claim (2) is also premature to the extent that it addresses matter to be determined on remand.

810 F.2d 869, 874 (9th Cir.1987) ("We may affirm the district court on any ground supported by the record, even if the ground is not relied on by the district court"). With regard to the claims of the United States that the County violated its sovereign immunity or discriminated against the United States in violation of its intergovernmental immunity, the Murphys' contention is without merit. The United States need not exhaust state remedies before raising claims arising under federal law in district court. See 28 U.S.C. §§ 1331, 1345 (1993); *Department of Employment v. United States*, 385 U.S. 355, 357-58, 87 S.Ct. 464, 17 L.Ed.2d 414 (1966); *United States v. Broward County*, 901 F.2d 1005, 1007-08 (11th Cir.1990). On the state-law question whether three parcels were properly classified as non-agricultural land, we prefer to have the district court rule in the first instance on the question of exhaustion and state limitations for exhaustion. We therefore leave that matter for disposition by the district court on remand, as the government concedes to be appropriate.

With regard to the Murphys' claim for attorneys fees, the issue is premature. The Equal Access to Justice Act provides for the award

of fees to "a prevailing party ... unless the court finds that the position of the United States was substantially justified." 28 U.S.C. § 2412(d)(1)(A). In light of our disposition of this appeal, the Murphys have not established themselves as a "prevailing party." Whether they prevail to any extent upon remand in a manner to require an award of fees is yet to be determined; the Murphys may renew their request in district court at the conclusion of further proceedings.

CONCLUSION

Lewis County may tax property held by the FSA pursuant to 7 U.S.C. § 1984, even though Washington law exempts state and local government property (including that of the Housing Commission) from taxation. Congress did not waive federal sovereign immunity from state or local interest, penalties, and foreclosure with regard to FSA property in Washington. The Murphys' cross- appeal is without merit.

The parties will bear their own costs in these appeals.

No. 97-35510 (Main Appeal): AFFIRMED IN PART; REVERSED IN PART, and REMANDED.

No. 97-35720 (Cross-Appeal): AFFIRMED IN PART; DISMISSED

IN PART.

APPENDIX B

UNITED STATES of America,

Plaintiff,

v.

LEWIS COUNTY, WA; Bill Brooks, County Assessor, Lewis County, Washington; Donna Karvia, Clerk, Lewis County Superior Court; Joe Cooke, Treasurer, Lewis County, Washington; Gary Zandel; Kevin E. Murphy; Bernice Murphy

Defendants.

No. C94-5474FDB

United States District Court,

Western District of Washington at Tacoma.

Filed April 14, 1997.

AMENDED ORDER GRANTING DEFENDANTS MURPHYS' MOTION FOR JUDGMENT ON THE PLEADINGS

This matter comes before the court upon Defendants Murphys' Motion for Judgment on The Pleadings. Defendants

Lewis County, and named current and former elected officials Bill Brooks, Assessor; Donna Karvia, Clerk; Joe Cooke, (former) Treasurer, and Gary Zandell, Auditor join in the Murphys' Motion. This matter arises out of the Defendants Murphy's purchase of certain property from Lewis County at a tax sale. The property was formerly owned by the Farmer's Home Administration (FmHA)(the predecessor to the Farm Service Agency (FSA). Defendants took possession of the property, made improvements on it, and have leased it for use as a diary.

The plaintiff's Complaint contains five counts. Count I alleges that since real property owned by the State of Washington, its agencies, or subdivisions is exempt from property taxation, and Lewis County does not, therefore, tax that property, the United States property held by the FmHA is unconstitutional because it discriminates against the United States in violation of the Supremacy Clause.

Count III alleges that 7 U.S.C. § 1984 does not waive immunity from imposition of the higher tax rate for nonfarm and agricultural land, and the imposition of taxes, penalties, and

interest against the United States is a violation of the United States" sovereign immunity.

Count IV alleges that 7 U.S.C. § 1984 does not waive immunity from imposition of penalties, interests, and other charges, and imposition of such charges is a violation of the United States sovereign immunity.

County V alleges that the conducting of tax and/or foreclosure sales or other collection actions impinging on the United States' property interests is prohibited by the Supremacy Clause and that such foreclosure and sale of the subject property herein is void ab initio.

The United States prays for (1) declaratory judgment (Lewis County is prohibited from assessing, collecting, etcetera, Washington property tax, recapture tax, penalties, interests and other costs on property owned by the United States and held by the FmHA under 7 U.S.C. §§ 1921 *et seq.*; the conveyances of the subject property at the foreclosure sale is null and void); (2) injunctive relief (restrain defendants from acting in concert to assessing, collecting; etcetera, the Washington property taxes); an

accounting from the Defendants Murphy; (3) monetary judgment for the United States for restitution of taxes paid under protest and for rents earned on the subject property; and (4) judgment quieting title in the subject property.

There is no dispute about whether the court may entertain a motion for judgment on the pleadings after remand or the timeliness of the motion, but Plaintiffs do oppose the motion on its merits. Each argument will be addressed in turn.

I. Timeliness of Motion

The Plaintiff objects to the attempt to secure a dismissal prior to undertaking any discovery, and based on comments by this Court in its earlier order. Plaintiff also objects to the Murphys challenging the merits of any claims except those in Count V, because there is no case or controversy with respect to the underlying tax, the higher tax rate for nonfarm land, and penalties and interest, as these disputes are solely between the United States and Lewis County.

Contrary to Plaintiff's argument, the Murphys' interests in the subject property are threatened by this lawsuit. The issues

raised in Counts I through V are inextricably intertwined. The issues presented are legal in nature, and there is no showing how a period of discovery would enhance the Court's ability to decide a purely legal issue. Moreover, the parties have thoroughly briefed the issues, so that the Court is fully advised in the premises without need to resort to the earlier order, except to note that statements may have been made therein that would harmonize with the analysis here.

II Claims for Relief

Plaintiff argues that with respect to Counts I and II, it is immune from taxation by Lewis County on FSA property, and that the purported waiver of that immunity in 7 U.S.C. § 1984 is an affirmative defense that Lewis County must establish. Alternatively, the taxing statues at issues are discriminatory in violation of the Supremacy Clause. Plaintiff argues the statute must be read narrowly and that FSA property is subject to taxation only "in the same manner and to the same extent as other property is taxed." Plaintiff argues that the statute is not a broad waiver of immunity. Moreover, Plaintiff argues that it cannot be held to

know that Washington would set up an instrumentality similar to FSA, called the Washington Housing Finance Commission, and give it a tax exemption that it did not give to FSA, but, FSA, continues, if the State has this exemption, the FSA property is similar and should have the exemption, too.

Defendants Murphy argue that the United States has subjected itself to taxation by the State of Washington through 7 U.S.C. §§ 1984 and related 7 C.F.R. §§ 1925.2 and 1925.4(b). The Section dealing with taxation is found in the Administrative Provisions subchapter of Chapter 50, Agricultural Credit, which concerns real estate loans, operating loans, and emergency loans. The purposes of the loans are for, amount other things, improving farms, for enterprises needed to supplement farm income, for refinancing existing indebtedness, for loan closing costs. 7 U.S.C. § 1923. Persons eligible for these loans are, *inter alia*, farmers and ranchers, farm cooperatives, private domestic corporations, and partnerships. 7 U.S.C. § 1922. In making loans for the purchase of farms, preference is to be given persons who have dependent families and to those capable of making initial down payments. 7

U.S.C. § 1923(a). Against this background, the taxation section provides:

> All property subject to a lien held by the United States or the Title to which is acquired or held by the Secretary under this chapter other than property used for administrative purposes shall be subject to taxation by State, territory, district, and local political subdivisions in the same manner and to the same extent as other property is taxed ... .

7 U.S.C. § 1984. It is difficult to read this statute in any way other than as a broad waiver of sovereign immunity from taxation by a State. Defendants note the competing interests of federal operations being free from local controls and the need for state and local governments to raise revenues. *See S.R.A. Inc. v. State of Minnesota*, 327 U.S. 558, 562 (1946). It also appears appropriate to consider the commercial character of a federal instrumentality's activities when deciding the degree of immunity from state law enjoyed by the federal entity. *See United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 733-739 (1979)(The court did not find

convincing the argument that because government lenders make loans where private entities would not it was entitled to greater protection.) In determining the scope of a congressional waiver of sovereign immunity, the commercial character of a federal instrumentality's activities have been a determining factor. *E.g., Federal Deposit Insurance Corp. v. Meyer,* 510 U.S. 471 (1994). The "commercial activity" theory also allows for the assessment of interest against a Federal entity. *See Vail v. Brown,* 841 F. Supp. 909 (D.Minn. 1994) *affirmed,* 39 F.3d 208 (8th Cir. 1994), *cert. den.,* 115 S.Ct. 2245 (1995). A similar conclusion seems inescapable as to penalties. FSA's own regulations direct the payment of delinquent taxes plus accrued penalties in certain circumstances. 7 C.F.R. § 1925.4(b) provides:

> Prior (usually about 90 days) to the time it is legally possible for action to be taken that will cause the borrower to lose title or right of possessions of the security property or the use of essential water, the County Supervisor will contact the borrower is unable or unwilling to pay the delinquent tax with

> his own funds after every appropriate effort has been made to have him do so, the County Supervisor will refer to FmHA or its successor agency under Public Law 103-354 Instruction 2014-A and utilize the Type 60 Purchase Order System to pay the amount of the delinquent taxes plus the amount of any accrued penalty to bring taxes current.

(Emphasis supplied.) In *Reconstruction Finance Corp. v. Beaver County,* 328 U.S. 204 (1946), the Court was interpreting language which subjected the Plaintiff to state or local taxation "to the same extent as other real property is taxed," and concluded that such language indicated an intent "to integrate Congressional permission to tax with established local tax assessment and collection machinery." *Id.* at 210. If the Federal government entity is not entitled to any greater protection than private institutions engaging in lending activities, then there is no principled reason to differentiate between a monetary penalty and foreclosure sale by a state in order to recoup delinquent taxes. A

Federal government entity such as FSA is subject to the same tax assessment and collection machinery when it subjects itself to State and local taxation. There is no prohibition in 7 U.S.C. § 1984 against levy, foreclosure, or sale, and Congress is fully capable of enacting such a provision as it did when waiving tax immunity for the Federal Deposit Insurance Corporation in 12 U.S.C. § 1825(b) where levy, attachment, garnishment, foreclosure, or sale of FDIC property for nonpayment of real property taxes without consent of FDIC was prohibited. The purposes of the FDIC are different that the purposes of the FSA, thus the broader waiver provision of FSA property would seem appropriate.

Also, as it is such common practice for states to exempt certain property, 7 U.S.C. § 1984 is most logically viewed as having been enacted with this knowledge. The only qualification on the waiver is regarding property used for administrative purposes. If Congress had meant to subject the FSA property to taxation only if state property under an entity analogous to FSA is also subject to taxation, it could have phrased the waiver more precisely. Such a provision doesn't make sense, however. A more

rational interpretation is that the FSA is acting as a private commercial lender and will subject itself to the State's taxation plan to accommodate the State's legitimate revenue raising interests. The State in exempting a state entity has control over the amount of property it exempts, but it cannot control a Federal program that proceeds to take an interest on property in the state and exempts it; it is appropriate under such circumstances when the government is acting as a commercial entity, to allow its property to be taxed.

Count III of the Complaint asserts that the United States has not waived immunity from the imposition of the higher tax rate for nonfarm and agricultural land and the additional tax imposed by that provision for the last seven years. The same rationale as discussed above applies here as to property held by the Secretary under the relevant chapter. There is no qualification on the type of tax to be applied to such property.

Count IV of the Complaint asserts that Lewis County's imposition of penalties, interest, and other charges against the United States is an unconstitutional violation of sovereign

immunity. Plaintiff cites *Blackburn v. United States,* 100 F.3d 1426 (9th Cir. 1996) for the proposition that absent a waiver of sovereign immunity, the United States is not subject to liability under state statutes which are penal in nature. There, a diver sued the United States for injuries he suffered from diving off a bridge in a national park; his theory was that the National park Service failed to warn of the dangers of jumping off the bridge, and that it negligently designed and maintained the bridge and the watercourse beneath it. The Plaintiff argued that the Assimilative Crimes Act (ACA) incorporated a state criminal statute that had no Federal equivalent. The Court held that "absent a waiver of sovereign immunity, the United States is not subject to liability under state statutes which are penal in nature." 100 F.3d at 1435. The Court reasoned that "[a]pplication of the Resort Act in the present case would violate the Supremacy Clause by constituting a direct and intrusive regulation by the State of the Federal Government's operation of its property at Yosemite." *Id.* *Blackburn* is not at all analogous to the situation with Lewis County. An express waiver is provided in 7 U.S.C. § 1984, and

taxation of the FSA property is unremarkable and in recognition of the State's interest. The discussion under Counts I and II above regarding penalties is also relevant here.

County V asserts that 7 U.S.C. § 1984 did not waive immunity from process to collect taxes by foreclosure sales or other methods. This assertion is not well taken, however, and the discussion above applies here, also. The United States waived immunity and subjected property held by the Secretary under Chapter 50 to taxation "in the same manner and to the same extent as other property is taxed." Moreover, "the phrase 'in the same manner' has a well understood meaning in legislation and that meaning is not one of restriction or limitation, but of procedure." *Wilder's S.S. Co. v. Low,* 112 F. 161, 164 (9th Cir. 1901). If the State is entitled to collect taxes on property, when the property owner fails to pay the taxes, the State must be entitled to collect them in the same manner from a United States entity as a private entity, barring a narrower waiver than is present in Lewis County's case.

Therefore, pursuant to the foregoing analysis and the

arguments presented by the Defendants Murphys, they are entitled to judgment on the pleadings.

Accordingly, it is hereby

ORDERED: Defendants Murphy's Motion for Judgment on the Pleadings is GRANTED and this cause of action against Defendants Kevin E. Murphy and Bernice Murphy; Lewis County, Bill Brooks, Donna Karvia, Joe Cooke, and Gary Zandell is DISMISSED.

DATED and SIGNED the 14th day of April, 1997.

By: Franklin D. Burgess

United States District Judge

UNITED STATES of America,

Plaintiff,

v.

LEWIS COUNTY, WA; Bill Brooks, County Assessor, Lewis County, Washington; Donna Karvia, Clerk, Lewis County Superior Court; Joe Cooke, Treasurer, Lewis County, Washington; Gary Zandel; Kevin E. Murphy; Bernice Murphy

Defendants.

No. C94-5474FDB

United States District Court,

Western District of Washington at Tacoma.

Filed June 27, 1997

JUDGMENT IN A CIVIL CASE

____**Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ **Decision by Court.** This action came to consideration before the Court upon the motion for the Defendants. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

This cause of action against Defendants Kevin E. Murphy and Bernice Murphy; Lewis County; Bill Brooks; Donna Karvia; Joe Cooke; and Gary Zandell is DISMISSED.

DATED and SIGNED the 27th day of June, 1997.

By: B. Kay McDermott, Deputy Clerk

APPENDIX C

UNITED STATES of America,

Plaintiff-Appellant/Cross-Appellee,

v.

LEWIS COUNTY, WA; Bill Brooks, County Assessor, Lewis County, Washington; Donna Karvia, Clerk, Lewis County Superior Court; Joe Cooke, Treasurer, Lewis County, Washington; Gary Zandel,

Defendants-Appellees,

and

Kevin E. Murphy; Bernice Murphy

Defendants-Appellees/Cross-Appellants.

CA Nos. 97-35510, 97-35720

United States Court of Appeals,

Ninth Circuit.

Filed May 20, 1999.

ORDER

BEFORE: CANBY and TASHIMA, Circuit Judges, and

TAKASUGI,[1] District Judge.

The petition for rehearing filed by appellees and cross-appellants is DENIED.

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1. The Honorable Robert M. Takasugi, Senior United States District Judge for the Central District of California, sitting by designation.

APPENDIX D

UNITED STATES of America,

Plaintiff-Appellant/Cross-Appellee,

v.

LEWIS COUNTY, WA; Bill Brooks, County Assessor, Lewis County, Washington; Donna Karvia, Clerk, Lewis County Superior Court; Joe Cooke, Treasurer, Lewis County, Washington; Gary Zandel,

Defendants-Appellees,

and

Kevin E. Murphy; Bernice Murphy

Defendants-Appellees/Cross-Appellants.

CA Nos. 97-35510, 97-35720

United States Court of Appeals,

Ninth Circuit.

Filed June 10, 1999.

ORDER

BEFORE: CANBY and TASHIMA, Circuit Judges, and

TAKASUGI,[1] District Judge.

Appellees and cross-appellants' motion to stay the mandate is GRANTED. Pursuant to Fed. R. App. P. 41(b), the issuance of the mandate is stayed for thirty (3) days from the date this order is filed. If, within that period, the Clerk of the Supreme Court advises the Clerk of this Court that a petition for certiorari has been filed, then the mandate shall be further stayed until final disposition of the matter by the Supreme Court.

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[1] The Honorable Robert M. Takasugi, Senior United States District Judge for the Central District of California, sitting by designation.

APPENDIX E

CONSTITUTIONAL PROVISIONS

FEDERAL

United States Constitution, Article III, Section 1:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish ...

United States Constitution, Article VI, Cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, and Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Constitution, Amendment X:

The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATE

Washington Constitution, Article VII, Section 3:

The United States and its agencies and instrumentalities, and their property, may be taxed under any of the tax laws of this state, whenever and in such manner as such taxation may be authorized or permitted under the laws of the United States, notwithstanding anything to the contrary in the Constitution of this state.

STATUTES

FEDERAL

7 U.S.C. §1921:

The Congress finds that the statutory authority of the Secretary of Agriculture, hereinafter referred to in this chapter as the "Secretary," for making and insuring loans to farmers and ranchers should be revised and consolidated to provide for more effective credit services to farmers.

7 U.S.C. §1984:

All property subject to a lien held by the United States or the title to which is acquired or held by the Secretary under this title or other than property used for administrative purposes shall be

subject to taxation by State, territory, district, and local political subdivision in the same manner and to the same extent as other property is taxed: Provided however, That no tax shall be imposed or collected on or with respect to any instrument if the tax is based-

(1) the value of any notes or mortgages or other lien instruments held by or transferred to the Secretary;

(2) any notes or lien instruments administered under this title which are made, assigned, or held by a person otherwise liable for such tax; or

(3) the value of any property conveyed or transferred to the Secretary,

Whether as a tax on the instrument, the privilege of conveying or transferring or the recordation thereof; nor shall the failure to pay or collect any such tax be a ground for refusal to record or file such instruments, or for failure to impart notice, or prevent the enforcement of its provisions in any State or Federal court.

7 U.S.C. §1985:

(c) **Sale of property.** (1) In general. Subject to this subsection and subsection (e)(1)(A), the Secretary shall offer to sell real property

that is acquired by the Secretary under this title using the following order and method of sale:

(B) Beginning farmer or rancher. (i) In general. Not later than 75 days after acquiring real property, the Secretary shall offer to sell the property to a qualified beginning farmer or rancher at current market value based on a current appraisal.

(ii) Random selection. If more than 1 qualified beginning farmer or rancher offers to purchase the property, the Secretary shall select between the qualified applicants on a random basis.

(iii) Appeal of random selection. A random selection or denial by the Secretary of a beginning farmer or rancher for farm inventory property under this subparagraph shall be final and not administratively appealable.

7 U.S.C. §1989:

The Secretary is authorized to make rules and regulations, prescribe the terms and conditions for making or insuring loans, security instruments and agreements, except as otherwise specified herein, and make such delegations of authority as he deems necessary to carry out this title.

7 U.S.C. §6932(a)(b)(3):

(a) Establishment: The Secretary is authorized to establish and maintain in the Department of Consolidated Farm Service Agency.

(b) Functions of the Consolidated Farm Service Agency: If the Secretary establishes the Consolidated Farm Service Agency under subsection (a), the Secretary is authorized to assign to the Agency jurisdiction over the following functions ...

> (3) Agricultural credit programs assigned before the date of the enactment of this Act [enacted Oct. 13, 1994] by law to the Farmers Home Administration ownership and operating, emergency, and disaster loan programs) and other lending programs for agricultural producers and others engaged in the production of agricultural commodities.

12 U.S.C. §531:

Federal reserve banks, including the capital stock and surplus therein and the income derived therefrom shall be exempt from Federal, State, and local taxation, except taxes upon real estate.

15 U.S.C. §610 (Repealed):

SEC 10. Any and all notes, debentures, bonds, or other such obligations issued by the corporation shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The coproration, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to be the same extent according to its value as other real property is taxed.

15 U.S.C. §646:

Any interest held by the Administration in property, as security for a loan, shall be subordinate to any lien on such property for taxes due on the property to a State, or political subdivision thereof, in

any case where such lien would, under applicable State law, be superior to such interest if such interest were held by any party other than the United States.

28 U.S.C. §960:

Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

28 U.S.C. §1254(1):

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. §1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

28 U.S.C. §1341:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. §1345:

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

28 U.S.C. §2412:

(a) (1) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States

shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(2) A judgment for costs, when awarded in favor of the United States in an action brought by the United States, may include an amount equal to the filing fee prescribed under section 1914(a) of this title. The preceding sentence shall not be construed as requiring the United States to pay any filing fee.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law

or under the terms of any statute which specifically provides for such an award.

(c) (1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2412 and 2517 of this title and shall be in addition to any relief provided in the judgment.

(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

(d) (1) (A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs

awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was

substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(D) If, in a civil action brought by the United States or a proceeding for judicial review of an adversary adjudication described in section 504(a)(4) of title 5, the demand by the United States is substantially in excess of the judgment finally obtained by the United States and is unreasonable when compared with such judgment under the facts and circumstances of the case, the court shall award to the party the fees and other expenses related to defending against the

excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this subparagraph shall be paid only as a consequence of appropriations provided in advance.

(2) For the purposes of this subsection -

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the

limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 114(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of title 5;

(C) United States" includes any agency and any official of

the United States acting in his or her official capacity;

(D) position of the United States" means, in addition to the position take by the United States in the civil action, the action of failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) "civil action brought by or against the United States" includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to the Contracts Disputes Act of 1978;

(F) "court" includes the United States Claims Court [United States Court of Federal Claims] and the United States Court of Veterans Appeals;

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement;

(H) "prevailing party," in the case of eminent domain proceedings, means a party who obtains a final judgment

(other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the government; and

(I) "demand" means the express demand of the United States which led to the adversary adjudication, but shall not include a recitation of the maximum statutory penalty (i) in the complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount.

(3) In awarding fees and other expenses under this subsection to a prevailing part in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary

adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(e) The provisions of this section shall not apply to any costs, fees, and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code of 1954 [26 USCS § 7430] applies (determined without regard to subsections (b) and (f) of such section [26 USCS § 8430(b), (1)]). Nothing in the preceding sentence shall prevent the awarding under subsection (a) 2412 of title 28, United States Code, of costs enumerated in section 1920 of such title (as in effect on October 1, 1981).

(f) If the United States appeals on an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part,

interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 19161(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance.

Act of July 22, 1937, Chapter 517:

SEC. 50. (a) All property which is being utilized to carry out the purposes of title I or title II of this Act (other than property used solely for administrative purposes) shall, notwithstanding that legal title to such property remains in the Secretary or the Corporation, be subject to taxation by the State, Territory, District, dependency, and political subdivision concerned, in the same manner and to the same extent as other similar property is taxed.

(b) All property to which subsection (a) of this section is inapplicable which is held by the Secretary or the Corporation pursuant to this Act shall be exempt from all taxation now or hereafter imposed by the United States or any State, Territory, District, dependency, or political subdivision, but nothing in this subsection shall be construed as affecting the authority or duty of

the Secretary under any other law to make payments in respect of any such property in lieu of taxes.

Farmers Home Administration Act of August 14, 1946, Chapter 964:

Sec. 50. (a) All property which is being utilized to carry out the purposes of title I of this Act (other than property used solely for administrative purposes) shall, notwithstanding that legal title to such property remains in the Secretary, be subject to taxation by the State, Territory, district, dependency, and political subdivision concerned, in the same manner and to the same extent as other similar property is taxed.

(b) All property to which subsection (a) of this section Is inapplicable which is held by the Secretary pursuant to this Act shall be exempt from all taxation now or hereafter imposed by the United States or any State, Territory, district, dependency, or political subdivision, but the Secretary shall make payments in respect of any such property In lieu of taxes.

STATE

R.C.W. 84.34.108:

(1)When land has once been classified under this chapter, a notation of such classification shall be made each year upon the assessment and tax rolls and such land shall be valued pursuant to RCW 84.31.060 or 84.34.065 until removal of all or a portion of such classification by the assessor upon occurrence of any of the following:

(a)Receipt of notice from the owner to remove all or a portion of such classification;

(b)Sale or transfer to an ownership, except a transfer that resulted from a default in loan payments made to or secured by a..governmental agency that intends to or is required by law or regulation to resell the property for the same use as before, making all or a portion of such land exempt from ad valorem taxation;

(c)Sale or transfer of all or a portion of such land to a new owner, unless the new owner has signed a notice of classification continuance, except transfer to an owner who is an heir or devisee of a deceased owner shall not, by itself, result in removal of

classification. The signed notice of continuance shall be attached to the real estate excise tax affidavit provided for in *RCW 82.45.120, as now or hereafter amended. The notice of continuance shall: be on a form prepared by the department of revenue. If the notice of continuance is not signed by the new owner and attached to the real estate excise tax affidavit, all additional taxes calculated pursuant to subsection (3) of this section shall become due and payable by the seller or transferor at time of sale. The county auditor shall not accept an instrument of conveyance of classified land for filing or recording unless the new owner has signed the notice of continuance or the additional tax has been paid. The seller, transferor; or new owner may appeal the new assessed valuation calculated under subsection (3) of this section to the county board of equalization. Jurisdiction is hereby conferred on the county board of equalization to hear these appeals;

(d) Determination by the assessor, after giving the owner written notice and an opportunity to be heard, that all or a portion of such land no longer meets the criteria for classification under this chapter. The criteria for classification pursuant to this chapter

continue to apply after classification has been granted.

The granting authority, upon request of an assessor, shall provide reason able assistance to the assessor in making a determination whether such land continues to meet the qualifications of RCW 3134.020 (1) or (3). The assistance shall be provided within thirty days of receipt of the request.

(2) Within thirty days after such removal of all or a portion of such land from current use classification, the assessor shall notify the owner in writing, setting forth the reasons for such removal. The seller, transferor, or owner may appeal such removal to the county board of equalization.

(3)Unless the removal is reversed on appeal, the assessor shall revalue the affected land with reference to full market value on the date of removal from classification. Both the assessed valuation before and after the removal of classification shall be listed and taxes shall be allocated according to that part of the year to which each assessed valuation applies. Except as~ provided in subsection (5) of this section, an additional tax, applicable interest, and penalty shall be imposed which shall be due and payable to the

county treasurer thirty days after the owner is notified of the amount of the additional tax. As soon as possible, the assessor shall compute the amount of such an additional tax, applicable interest, and penalty and the treasurer shall mail notice to the owner of the amount thereof and the date on which payment is due. The amount of such additional tax, applicable interest, and penalty shall be determined as follows:

(a)The amount of additional tax shall be equal to the difference between the property tax paid as open space land, "farm and agricultural land" or "timber land" and the amount of property tax otherwise due and payable for the seven years last past had the land not been so classified;

(b)The amount of applicable interest shall be equal to the interest upon the amounts of such additional. tax paid at the same statutory rate charged on delinquent property taxes from the dates on which such additional tax could have been paid without penalty if the land had been assessed at a value without regard to this chapter;

(c)The amount of the penalty shall be as provided in RCW 84.34.080. The penalty shall not be imposed if the removal

satisfies the conditions of RCW 84.34.070. (4)Additional tax, applicable interest, and penalty, shall become a lien on such land which shall attach at the time such land is removed from classification, under this chapter and shall have priority to and shall be fully paid and satisfied before any recognizance, mortgage, judgment, debt, obligation or responsibility to or with which such land may become charged or liable. Such lien may be foreclosed upon expiration of the same period after delinquency and in the same manner provided by law for foreclosure of liens for delinquent real property taxes as provided in RCW 84.64.050 now or as hereafter amended. Any additional tax unpaid on its due date shall thereupon become delinquent. From the date of delinquency until paid, interest shall be charged at the same rate applied by law to delinquent ad valorem property taxes.

(5)The additional tax, applicable interest, and penalty specified in subsection (3) of this section shall not be imposed if the removal of classification pursuant to subsection (1) of this section resulted solely from:

(a)Transfer to a government entity in exchange for other land

located within the state of Washington;

(b)(i) A taking through the exercise of the power of eminent domain, or (ii) sale or transfer to an entity having the power of eminent domain in anticipation of the exercise of such power, said entity having manifested its intent in writing or by other official action;

(c) A natural disaster such as a flood, windstorm, earthquake, or other such calamity rather than by virtue of the act of the landowner changing the use of such property;

(d) Official action by an agency of the state of Washington or by the county or city within which the land is located which disallows the present use of such land;

(e) Transfer of land to a church when such land would qualify for exemption pursuant to RCW 84.36.020;

(g) Acquisition of property interests by state agencies or agencies or organizations qualified under RCW 84.34.210 and 64.04.130 for the purposes enumerated in those sections: PROVIDED, That at such time as these property interests are not used for the purposes enumerated in RCW 84.34.210 and 64.04.130 the additional tax

specified in subsection (3) of this section shall be imposed; or

(g) Removal of land classified as farm and agricultural land under RCW 84.34.020(2)(d).

R.C.W. 84.64.050:

After the expiration of three years from the date of delinquency, when any property remains on the tax rolls for which no certificate of delinquency has been issued, the county treasurer shall proceed to issue certificates of delinquency on said property to the county treasurer, with the consent of the county legislative authority, may elect to issue a certificate for fewer than all years' taxes, interest, and costs to a minimum of the taxes, interest, and costs for the earliest year.

The county treasurer may include in the certificate of delinquency any assessments which are due on the property and are the responsibility of the county treasurer to collect. For purposes of this chapter, "taxes, interest, and costs" include any assessments which are so included by the county treasurer.

The change to a three-year grace period shall first be effective on May 1, 1983. Prior to that date, the county treasurer shall send a

notice to all taxpayers with taxes delinquent for two years or more, notifying them of the change in the grace period. The treasurer shall file said certificates when completed with the clerk of the court, and the treasurer shall thereupon, with such legal assistance as the county legislative authority shall provide in counties having a population of thirty thousand or more, and with the assistance of the county prosecuting attorney in counties having a population of less than thirty thousand, proceed to foreclose in the name of the county, the tax liens embraced in such certificates, and the same proceedings shall be had as when held by an individual: *Provided,* That notice and summons must e served or notice given in a manner reasonably calculated to inform the owner or owners, and any person having a recorded interest in or lien of record upon the property, of the foreclosure action. Either (1) personal service upon the owner or owners and any person having a recorded interest in or lien of record upon the property, or (2) publication once in a newspaper of general circulation, which is circulated in the area of the property and mailing of notice by certified mail to the owner or owners and any person having a recorded interest in

or lien of record upon the property, or, if a mailing address is unavailable, personal service upon the occupant of the property, if any, is sufficient. In addition to the legal description on the tax rolls, the notice must include the local street address, if any. It shall be the duty of the county treasurer to mail a copy of the published summons, within fifteen days after the first publication thereof, to the treasurer of each city or town within which any property involved in a tax foreclosure is situated, but the treasurer's failure to do so shall not affect the jurisdiction of the court nor the priority of any tax sought to be foreclosed. Said certificates of delinquency issued to the county may be issued in one general certificate in book form including all property, and the proceedings to foreclose the liens against said property may be brought in one action and all persons interested in any of the property involved in said proceedings may be made codefendant's in said action, and if unknown may be therein named as unknown owners, and the publication of such notice shall be sufficient service thereof on all persons interested in the property described therein, except as provided above. The person or persons whose

name or names appear on the treasurer's rolls as the owner or owners of said property shall be considered and treated as the owner or owners of said property for the purpose of this section, and if upon said treasurer's rolls it appears that the owner or owners of said property are unknown, then said property shall be proceeded against, as belonging to an unknown owner or owners, as the case may be, and all persons owning or claiming to own, or having or claiming to have an interest therein, are hereby required to take notice of said proceedings and of any and all steps thereunder: *Provided,* That prior to the sale of the property, if such property is shown on the tax rolls under unknown owners or as having an assessed value of three thousand dollars or more, the treasurer shall order or conduct a title search of the property to be sold to determine the legal description of the property to be sold and the record title holder, and if the record title holder or holders differ from the person or persons whose name or names appear on the treasurer's rolls as the owner or owners, the record title holder or holders shall be considered and treated as the owner or owners of said property for the purpose of this section, and shall be entitled

to the notice provided for in this section.

The county treasurer shall not issue certificates of delinquency upon property which is eligible for deferral of taxes under chapter 84.38 RCW but shall require the owner of the property to file a declaration to defer taxes under chapter 84.38 RCW.

R.C.W. 84.68.020:

In all cases of the levy of taxes for public revenue which are deemed unlawful or excessive by the person, firm or corporation whose property is taxed, or from whom such tax is demanded or enforced, such person, firm, or corporation may pay such tax or any part thereof deemed unlawful, under written protest setting forth all of the grounds upon which such tax is claimed to be unlawful or excessive; and thereupon the person, firm or corporation so paying, or their legal representatives or assigns, may bring an action in the superior court or in any federal court of competent jurisdiction against the state, county or municipality by whose officers the same was collected, to recover such tax, or any portion thereof, so paid under protest: *Provided* That R.C.W. 84.68.010 through 84.68.070 shall not be deemed to enlarge the

grounds upon which taxes may now be recovered: *And provided further,* That no claim need be presented to the state or county or municipality, or any of their respective officers, for the return of such protested tax as a condition precedent to the institution of such action.

R.C.W. 84.68.060:

No action instituted pursuant to this chapter or otherwise to recover any tax levied or assessed shall be commenced after the 30th day of the next succeeding June following the year in which said tax became payable.

R.C.W. 84.68.070:

Except as permitted by RCW 84.68.010 through RCW 84.68.070 and chapter 84.69 RCW, no action shall ever be brought or defense interposed attacking the validity of any tax, or any portion of any tax: *Provided, however,* That this section shall not be construed as depriving the defendants in any tax foreclosure proceeding of any valid defense allowed by law to the tax sought to be foreclosed therein except defenses based upon alleged excessive valuations, levies or taxes.

REGULATIONS

FEDERAL

7 C.F.R. §1925.2:

For the purpose of this instruction, the word "tax" means all taxes, assessments, levies, irrigation and water charges or other similar obligations which are or will, on nonpayment, become a lien upon the real estate prior to the mortgage securing the Farmers Home Administration or its successor agency under Public Law 103-354 (FmHA or its successor agency under Public Law 103-354) loan.

7 C.F.R. §1925.4(b):

Prior (usually about 90 days) to the time it is legally possible for action to be take that will cause the borrower to lose title or right of possession of the security property or the use of essential water, the County Supervisor will contact the borrower and definitely determine if he will pay the delinquent tax immediately. If the borrower is unable or unwilling to pay the delinquent tax with his own funds after every appropriate effort has been made to have him do so, the County Supervisor will refer to FmHA Instruction 2024—A and utilize the Type 60 Purchase Order system to pay the

amount of the delinquent taxes plus the amount of any accrued penalty to bring taxes current.

No. 99-48

In the Supreme Court of the United States

LEWIS COUNTY, WASHINGTON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a statutory consent to state and local "taxation" of property held by the Farm Service Agency of the United States Department of Agriculture (7 U.S.C. 1984) also consents to the imposition of penalties and interest accruing on such taxes under local law and to foreclosure sales of such property for satisfaction of local property taxes.

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In the Supreme Court of the United States

No. 99-48

LEWIS COUNTY, WASHINGTON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A24) is reported at 175 F.3d 671. A decision of the court of appeals that addresses an issue not raised in the petition is unpublished, but the decision is noted at 94 F.3d 654 (Table). The opinion of the district court (Pet. App. B1-B14) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1999. A petition for rehearing was denied on May 20, 1999 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on July 2, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Farm Service Agency (FSA) is an agency within the United States Department of Agriculture that administers a loan program for qualified farmers and ranchers (Pet. App. A5).[1] When a borrower defaults on a FSA loan, the agency acquires title to the land that secures the loan (7 U.S.C. 1985(a); Pet. App. A5). The FSA is required to sell such property to qualified farmers and ranchers whenever possible (7 U.S.C. 1985(c)(1)(B); Pet. App. A18). During the period that the agency holds such property, Congress has provided that the property "shall be subject to taxation by State, territory, district, and local political subdivisions in the same manner and to the same extent as other property is taxed" under local law (7 U.S.C. 1984).

Between 1984 and 1990, the FSA acquired 20 parcels of farmland from defaulting borrowers in Lewis County, Washington. When the County assessed taxes against these properties, the FSA declined to pay the taxes as well as the interest and penalties imposed by the County under state law (Pet. App. A6).

In 1990, the County foreclosed on three of these parcels, purportedly purchasing them at a tax sale (CR 1, at 8-9, 11-12).[2] In January 1994, the FSA paid the taxes, interest, penalties and other charges assessed on another parcel under protest, in order to pass clear title to an eligible buyer (*id.* at 11). A tax sale of the remaining 16 parcels was noticed for May 13, 1994 (*id.*

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[1] This suit was brought by the FSA in its capacity as the successor of the Farmers Home Administration. See 7 U.S.C. 6932(a), (b)(3).

[2] "CR" refers to the docket control numbers assigned by the Clerk of the District Court to the original record.

at 13). Prior to that date, the FSA paid the property taxes, penalties, interest and other charges on 15 of the parcels under protest (*ibid.*). On May 13, 1994, the County sold the remaining parcel to petitioners Kevin and Bernice Murphy (*id.* at 15).

In 1994, Lewis County took the position that the FSA was not using the defaulted properties for agriculture purposes and sought to tax those properties at a higher rate (CR. 1, at 14). The FSA paid the new assessments under protest (*id.* at 14-15).

2. The United States then commenced this action to challenge the assessment of taxes, interest and penalties on the property held by the FSA. The United States contended that, by consenting to state and local taxation "in the same manner and to the same extent as other property is taxed" (7 U.S.C. 1984), Congress did not consent to the taxation of FSA property when similar property held by state and local authorities performing a similar lending function is exempt from tax under state law. The complaint further sought a declaration that the consent to "taxation" in 7 U.S.C. 1984 did not consent to the imposition of interest, penalties and other charges under state law or to foreclosure sales of federal government property.[3]

Relying on the Tax Injunction Act (28 U.S.C. 1341), the district court dismissed the complaint for lack of jurisdiction (Pet. App. A6). Because that Act does not apply to suits brought by the United States, however, the court of appeals reversed and remanded for con-

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[3] Petitioners Kevin and Bernice Murphy filed a counterclaim in which they asserted that, if the United States prevails in its challenge to the foreclosure sales, they should be reimbursed for the value of improvements made by them to the contested property (CR 6).

sideration of the merits of the government's complaint (*id.* at A6-A7).

3. On remand, the district court ruled against the United States on the merits (Pet. App. B8-B14). The court of appeals affirmed in part, reversed in part and remanded (*id.* at A1-A24), holding "that Lewis County may [by virtue of 7 U.S.C. 1984] tax the [federal government's] properties in issue, but that it may neither impose interest and penalties nor foreclose on those properties" (Pet. App. A4).[4]

The court of appeals rejected the contention of the United States that 7 U.S.C. 1984 does not allow state and local taxation of property held by the FSA when similar property held by the Washington State Housing Finance Commission upon default of state loans is exempt from tax under state law. The court held that the statutory consent to taxation of federal property "in the same manner and to the same extent as other property is taxed" under state law (7 U.S.C. 1984) does not incorporate state-law tax immunities for state and local agencies. The court reasoned that such state-law immunities were not incorporated because, in enacting this statute, Congress sought to preserve the local tax base in counties where the FSA operated (Pet. App. A7-A9).

The court of appeals concluded, however, that the statutory consent to state and local "taxation" of federal property (7 U.S.C. 1984) does not *also* consent to the imposition of state-law penalties and interest or to the

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[4] Petitioners Kevin and Bernice Murphy filed a cross-appeal (Pet. App. A5). See note 3, *supra*. The court of appeals noted that the Murphys were not entitled to appeal because they were prevailing parties in the district court and that, in any event, the issues raised by the Murphys were premature (*id.* at A21-A23).

foreclosure of federal property under state law. Applying the decisions of this Court in *Library of Congress* v. *Shaw*, 478 U.S. 310, 314-316 (1986), *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 658-659 (1947), *United States Department of Energy* v. *Ohio*, 503 U.S. 607, 615 (1992), and *United States* v. *Alabama*, 313 U.S. 274, 282 (1941), the court of appeals concluded that state-law penalties and interest are not within the scope of the waiver because consent to "taxation" "does not unequivocally include the assessment of interest and penalties" (Pet. App. A16). In reaching that conclusion, the court noted that its decision conflicts with the decision of the Fourth Circuit in *Federal Reserve Bank* v. *Richmond*, 957 F.2d 134 (1992), and with the decision of the Fifth Circuit in *Reconstruction Finance Corp.* v. *Texas*, 229 F.2d 9, cert. denied, 351 U.S. 907 (1956). The court stated that it "disagree[s] with the approach of the Fourth and Fifth Circuits" in those cases (Pet. App. A14).

The court of appeals remanded for the district court to address whether Lewis County had improperly assessed FSA property under the higher, non-agricultural rate (Pet. App. A19-A20, A22) and for further proceedings on the Murphys' counterclaim (*id.* at A4, A19 n.8, A21 n.9, A22-A24). See notes 3, 4, *supra*.

ARGUMENT

The courts of appeals are in conflict on the question whether a statutory consent to the imposition of state and local taxes on federal property also constitutes consent to the imposition of state-law penalties and interest on such taxes or to foreclosure sales of federal property. In the petition for a writ of certiorari filed in *United States* v. *County of Cook*, No. 99-345, the

United States has requested the Court to review that issue.[5] As the court of appeals noted, however, the proper disposition of the present case does not ultimately require resolution of that conflict (Pet. App. A14 n.6). The petition for a writ of certiorari in this case should therefore be denied.

1. It is, of course, well established that, in the absence of statutory consent, "a State may not * * * lay a tax 'directly upon the United States'." *United States* v. *New Mexico*, 455 U.S. 720, 733 (1982), quoting *Mayo* v. *United States*, 319 U.S. 441, 447 (1943). The "absolute federal immunity from state taxation" applies whenever the state "levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities" (*United States* v. *New Mexico*, 455 U.S. at 733, 735) or when the state tax scheme "operat[es] so as to discriminate against the Government or those with whom it deals" (*Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 812 (1989), quoting *United States* v. *City of Detroit*, 355 U.S. 466, 473 (1958)).

By consenting to state and local "taxation" of certain types of federal property under 7 U.S.C. 1984, Congress did not also consent to the imposition of penalties and interest under state law or to foreclosure sales of federal property. "[I]n the absence of constitutional requirements, interest can be recovered against the United States only if express consent to such a recovery has been given by Congress. . . . There can be no consent by implication or by use of any ambiguous language." *United States* v. *N.Y. Rayon Importing*

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[5] We are providing a copy of the petition filed by the United States in No. 99-345 to petitioners in this case.

Co., 329 U.S. 654, 659 (1947). That same principle applies with equal force to penalties. See *United States Dep't of Energy* v. *Ohio*, 503 U.S. 607, 615 (1992). Moreover, any waiver of sovereign immunity must be strictly construed in favor of the sovereign. *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 34 (1992); *McMahon* v. *United States*, 342 U.S. 25, 27 (1951). Applying these settled principles, the court of appeals correctly concluded in this case that a consent to the imposition of state and local "taxation" is not an unambiguous waiver of immunity from state-law penalties and interest and does not authorize foreclosure sales of federal property (Pet. App. A15-A19).[6]

In reaching that conclusion, the court of appeals noted (Pet. App. A13-A14) that its decision conflicts with the decision of the Fourth Circuit in *Federal Reserve Bank* v. *Richmond*, 957 F.2d 134 (1992). In the *Richmond* case, the Fourth Circuit had before it a federal statute that consented to state and local "taxes upon real estate" owned by Federal Reserve banks (12 U.S.C. 531). The court held in *Richmond* that the term "taxes" in that statute should be interpreted consistently with the state definition of "taxes," which encompassed penalties and interest as well as basic tax charges. The court reasoned in *Richmond* that Congress should not be understood to have permitted the States "to tax the real property of the Federal Reserve banks and yet require them to alter their

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[6] Petitioners erroneously seek to rely (Pet. 26) on a regulation (7 C.F.R. 1925.4(b)) that authorizes the FSA to make additional loans to a borrower—in the amount of the borrower's delinquent taxes plus any accrued penalty—to bring taxes current in order to stave off default. That regulation has no bearing on the scope of the waiver by the United States of immunity from state and local "taxation" under 7 U.S.C. 1984.

settled practices concerning the collection of these taxes." 957 F.2d at 137. In reaching that conclusion, the Fourth Circuit correctly noted that its decision was "in agreement with" (*ibid.*) the decision of the Fifth Circuit in *Reconstruction Finance Corp.* v. *Texas*, 229 F.2d 9, cert. denied, 351 U.S. 907 (1956), which held that a statute that authorizes "taxation" of federal property incorporates "settled State rules in determining whether the word 'taxation' * * * includes penalties and interest." 229 F.2d at 11. In the present case, the Ninth Circuit stated that it "disagree[s] with the approach of the Fourth and Fifth Circuits" in the *Reconstruction Finance* and *Richmond* cases (Pet. App. A14).[7]

The court of appeals went on to note in this case that, even if the analysis of the *Reconstruction Finance* and *Richmond* cases were applied here, "the County would fare no better" (Pet. App. A14 n.6). This is because interest and penalties are not "a part of the tax" under Washington law (*ibid.*, quoting *Henry* v. *McKay*, 533, 3 P.2d 145, 148 (Wash. 1931)). Whether the analysis of the Ninth Circuit or of the Fourth and Fifth Circuit is

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[7] Petitioners err in contending (Pet. 8, 10, 24-26) that the decision in this case conflicts with *Reconstruction Finance Corp.* v. *Beaver County*, 328 U.S. 204 (1946). That case presented the question whether Congress, in allowing "any real property of the [Reconstruction Finance] [C]orporation [to be] subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed" (15 U.S.C. 610 (Supp. I 1941), permitted Beaver County to tax as real property heavy factory machinery when such machinery was considered part of the factory real estate under state law. That case concerned the definition of the term "real estate" as used in that statute; it did not involve the issue presented in this case of whether a waiver of immunity from "taxation" extends to state-imposed penalties, interest and foreclosure.

applied to this case, the result is thus the same: by consenting to state "taxation," Congress did not consent to the imposition of the penalties and interest assessed in this case.

Because resolution of the conflict in the reasoning adopted by the Fourth, Fifth and Ninth Circuits is not necessary to the proper disposition of this case, review by this Court is not warranted. This Court sits "to correct wrong judgments, not to revise opinions" (*Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945)).

2. There is no conflict between the decision below and cases such as *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), *United States* v. *Tipton*, 898 F.2d 770 (10th Cir. 1990), and *Pearlstein* v. *SBA*, 719 F.2d 1169 (D.C. Cir. 1983), on which petitioners rely (Pet. 21-23). Those cases involve whether state law provides the rule of decision in determining the priority of the statutory liens that the United States acquires through its lending programs. They do not involve the scope of the various statutory waivers of the immunity of the United States from state and local "taxation."

Contrary to the petitioners' assertion (Pet. 20), this case does not implicate the exception to the rule against imposing interest against the United States described by this Court in *Standard Oil Co.* v. *United States*, 267 U.S. 76, 79 (1925). In *Standard Oil*, the Court held that the United States, in entering the insurance business—issuing policies in familiar form and providing that in case of disagreement it would be subject to suit—accepted the ordinary incidents of suits in such business, which included the payment of interest. *Ibid.* In the present case, however, the United States has not "cast off the cloak of sovereignty and assumed the status of a private commercial enterprise." *Library of Congress* v. *Shaw*, 478 U.S. at 317 n.5. To the contrary,

the United States has merely allowed a limited form of "taxation" of federal property (7 U.S.C. 1984). This Court has consistently held that such limited waivers of sovereign immunity "will be strictly construed" and that all ambiguities are to be resolved "in favor" of immunity (*Lane* v. *Pena*, 518 U.S. 187, 192 (1996), quoting *United States* v. *Williams*, 514 U.S. 527, 531 (1995)).[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1999

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[8] Petitioners incorrectly assert (Pet. 11-12) that the United States was required to exhaust state remedies before bringing its challenge to state and local taxes in federal court. This Court has made abundantly clear that the United States may litigate its tax claims against States and local governments without exhausting state and local remedies. See *Department of Employment* v. *United States*, 385 U.S. 355, 357-358 (1966). The decision on which petitioners rely—*United States* v. *California*, 507 U.S. 746 (1993)—is plainly inapposite, for it concerns the different situation in which the United States asserts a claim obtained as the subrogee of a private party. The Court held in *California* that, when the United States merely steps into the shoes of a private party as subrogee, its rights are subject to all preexisting defenses to that claim, including the requirement of exhaustion of remedies. *Id.* at 756-757. In *California*, the Court expressly noted that exhaustion of state remedies is *not* required when "the [g]overnment [is] proceeding in its sovereign capacity." *Id.* at 757, citing *United States* v. *Summerlin*, 310 U.S. 414, 417 (1940).

Supreme Court, U.S.
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No. 99-48

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1998

LEWIS COUNTY , WASHINGTON; BILL BROOKS, County Assessor, Lewis County, Washington; DONNA KARVIA, Clerk, Lewis County Superior Court; JOE COOKE, Treasurer, Lewis County, Washington; GARY ZANDEL, County Auditor, Lewis County Washington, KEVIN E. MURPHY, BERNICE MURPHY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY

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REPLY

Petitioners submit the following reply to the brief of the United States of America in opposition:

The United States' interpretation of the term "taxation" in 7 USC §1984 cannot be reconciled with the Court's interpretation of that term in 15 USC §610 in *Reconstruction Finance Corporation v. Beaver County*, 328 U.S. 204, 209 (1946). The similarity in the language between 7 USC §1984 and 15 USC §610 provides "strong indication that [they] should be interpreted *pari passu*." *United States Department of Energy v. Ohio*, 503 U.S. 607, 626 (1992) (quoting *Northcross v. Memphis Board of Education*, 412 U.S. 427, 428 (1973)).

The United States, as did the Court of Appeals, misplaces reliance upon *United States v. New York Rayon Importing Company*, 329 U.S. 654 (1947).[1] The statute in question in *New York Rayon Importing Company*, former 28 USC §284(a), unlike 7 USC §1984, expressly forbade interest on any claim up to rendition by judgment

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[1] Brief for the United States in Opposition, p. 6-7; Pet App. A15.

in the Court of Claims, unless upon a contract expressly providing for the payment of interest. Further, *New York Rayon Importing Company* involves no issue of a statutory *waiver of* intergovernmental tax immunity.

Moreover, this Court's invocation in *New York Rayon Importing Company* of a narrow rule of statutory construction in favor of the sovereign was not unqualified. Rather, such a rule was properly invoked "in the absence of constitutional requirements." 329 U.S. 658. In contrast, Congress' efforts in 7 USC §1984 to reconcile the competing interests of the federal and state sovereigns compels rejection of any rule of statutory construction that would imply immunity from interest from the silence of Congress on that issue. *Graves v. New York ex rel O'Keefe*, 306 U.S. 466, 480 (1939); *California State Board of Education v. Sierra Summit, Inc.*, 490 U.S. 848, 851-52 (1989).

Equally misplaced is the United States' reliance upon *United States Department of Energy v. Ohio*, 503 U.S. 607 (1992), *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992), and *McMahon v. United States*, 342 U.S. 252 (1951). Neither *Department of Energy*

nor *Nordic Village* nor *McMahon* involved any issue concerning a Congressional waiver of intergovernmental tax immunity.

Moreover, the United States' reliance upon *Department of Energy*, *Nordic Village* and *McMahon* rests upon the dubious premise that the doctrine of sovereign immunity is synonymous with intergovernmental tax immunity. The two doctrines are distinct. *United States v. Hynes*, 20 F.3d 1437, 1441 n. 1 (7th Cir. 1994) (en banc) (Cudahy, J. concurring).

The United States' interpretation of 7 CFR §1925.4(b) cannot be reconciled with the language of that regulation.[2] The regulation gives explicit directive to FSA's county supervisor to pay the borrower's delinquent taxes plus accrued penalty. (Pet. App. E32). That FSA might subsequently add the taxes and penalty so paid to the borrower's obligation does not detract from the clear mandate of the regulation.

By holding that the waiver of immunity in 7 USC §1984 does not extend to penalties, the Court of Appeals has impermissibly

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[2] Brief for United States in Opposition, p. 7, n. 6.

substituted its own construction of a statutory provision for a reasonable interpretation of the provision made by an administrative agency. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984); *United States v. Haggar Apparel Company*, 119 S.Ct. 1392, 1395 (1999).

The United States' invocation of a rule of strict construction of 7 USC §1984 is central to its position in these proceedings.[3] At no time in these proceedings has the United States attempted to reconcile its advocacy for such a rule with the analysis in *California State Board of Education v. Summit, Inc.*, 490 U.S. 848 (1989). *Sierra Summit* embraced a liberal construction of the waiver of tax immunity in 28 USC §960.[4] 490 U.S. 852, n. 9. Nor can the United States' construction of 7 USC §1984 by way of negative implication [5] be reconciled with *Sierra Summit*'s rejection of such reasoning in resolving issues of immunity from taxation.

The United States, as did the Court of Appeals, advocates

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[3] Brief for the United States in Opposition, p. 6-7.

[4] Pet. App. E7.

[5] Brief of the United States in Opposition, p. 6.

resolution of the issue of immunity by reference to a uniform federal rule.[6] Such a view cannot be reconciled with this Court's analysis in *Reconstruction Finance Corporation v. Beaver County*, 328 U.S. 204, 209 (1946). The view of the United States is equally at odds with the analysis in *Federal Reserve Bank v. City of Richmond*, 957 F.2d 134, 135-36 (4th Cir. 1992).

Nor does definition of the term "taxation" in 7 USC §1984 by reference to state law support the United States' position. Congress' consent to the "manner" and "extent" of "taxation" in 7 USC §1984 is not determined by whether penalties and interest are "taxes" under state law. To define "taxation" in such a manner deprives that term of its ordinary meaning as referring to "[t]he process of taxing or imposing a tax." Black's Law Dictionary (4th Ed. 1968), p. 1631.

Henry v. McKay, 164 Wash 526, 3 P.2d 145 (1931) does not control here, as the court in that case was not called upon to construe the term "taxation" in a statute.

Reconstruction Finance Corporation v. Texas, 229 F.2d 9,

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[6] Brief of the United States in Opposition, p. 7; Pet. App. A14.

cert. denied, 351 US 907 (1956), does not resolve the inquiry here. The statute in question in *Reconstruction Finance*, 15 USC §607, unlike 7 USC §1984, only gave consent to the "extent" of local taxation. 229 F.2d 11. In contrast, the consent to local "taxation" in 7 USC §1984 extends to both its "manner" and "extent." Further, *Reconstruction Finance*'s invocation of a rule of strict construction is at odds with *Beaver County* and *Sierra Summit*.

The United States' efforts to avoid the commercial activity exception to the no interest rule will not withstand scrutiny.[7] The actions of FSA and its predecessor at issue here are those of a quasi-commercial lender, not deserving of any special status. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 737-38 (1979). FSA's lending activities at issue here are no less commercial than was the issuance of insurance policies in *Standard Oil Company v. United States*, 267 U.S. 76, 79 (1925). FSA's activities in this case are no less commercial than the lending activities of the federally chartered production credit association in *Arkansas v. Farm Credit Services of*

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[7] Brief of the United States in Opposition, p. 9-10.

Arkansas, 520 U.S. 821, 831-32 (1997). *Kimbell*, *Standard Oil*, and *Farm Credit Services* render unsupportable the United States' position regarding immunity from interest, penalties and foreclosure.

The decision of the Court of Appeals violates the doctrines of federalism and separation of powers.[8] The Brief of the United States in Opposition gives scant consideration to these issues. Similarly, the United States offers no response to Petitioners' argument concerning *United States v. Alabama*, 313 U.S. 274 (1941).[9]

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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[8] Pet. at 12-17.

[9] Pet. at 27.

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